Supreme Court, U.S.
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No. 06-

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IN THE

Supreme Court of the United States

URBAN BRANDS, INC.,

Petitioner,

v.

EVELYN RODRIGUEZ-OQUENDO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal bankruptcy court's order made pursuant to Section 363(f) of the Bankruptcy Code, which authorizes a debtor's property to be sold "free and clear of all interest in such property," as well as pursuant to the incidental powers conferred by Section 105(a) of the Bankruptcy Code, may validly extinguish state common law successor liability claims asserted against a purchaser of such property of the debtor.

STATEMENT OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner Urban Brands Inc. states that it has no publicly traded parent, and no publicly traded company holds 10% or more of the stock in Urban Brands, Inc.

Except that the defendant in the proceedings below was named as "Petrie Retail Inc. (Debtor in Possession) and/or Centro Retail Corporation D/B/A Marianne," the caption names all parties and/or participants in the proceedings below.

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OPINION BELOW

The opinion of the court below is reported at Decisions of the Supreme Court of Puerto Rico, 2006 TSPR 26. A certified English translation is enclosed in the Appendix. (App. A.)

JURISDICTION

The judgment of the Supreme Court of Puerto Rico was entered on April 11, 2006. The Supreme Court of Puerto Rico issued an order denying a timely petition for reconsideration on May 23, 2006. (App. F.) On July 16, 2006, this Court granted Petitioner an extension of time through October 20, 2006 to file this Petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1258.

STATUTORY PROVISIONS INVOLVED

Section 363(f) of the United States Bankruptcy Code, 11 U.S.C. § 1 *et seq.* (the "Bankruptcy Code"), provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). (*See* App. H at 80a.)

Section 105(a) of the Bankruptcy Code states that a court may "issue any order . . . necessary or appropriate to carry out the provisions of [title 11]." 11 U.S.C. § 105(a). (*See* App. H at 73a.)

STATEMENT OF THE CASE

This Petition asks the Court to resolve a deep conflict within the state and federal courts on the important federal question concerning a federal bankruptcy court's power, pursuant to Section 363(f) and 105(a) of the Bankruptcy Code, to extinguish successor liability claims for purchasers of a debtor's assets.

In late 1998, Petitioner Urban Brands purchased Marianne Stores, a Puerto Rico department store chain, from Petrie Retail, Inc. ("Petrie"), a debtor then undergoing a reorganization pursuant to Chapter 11 of the Bankruptcy Code. As part of that reorganization, Petrie's creditors' committee sought and obtained permission from the United States Bankruptcy Court for the Southern District of New York (the "SDNY Bankruptcy Court") to sell various Petrie assets, including Marianne Stores, to an affiliate of Petitioner. On December 1, 1998, the SDNY Bankruptcy Court issued an order authorizing such sale and providing that:

> Pursuant to Sections 105(a) and 363(f) of the Bankruptcy Code, the Purchased Assets [including Marianne Stores] shall be transferred to the Purchaser upon the Closing *free and clear of all Liens and Claims of any kind or nature*, with all such Liens and Claims and Interests released, terminated and discharged as to the Purchased Assets, which Liens and Claims shall attach to the net proceeds of sale, in the order of their priority, with the same validity, force and effect that they now have against the Purchased Assets except for the Permitted Liens.

(App. E (Dec. 1, 1998 Order of U.S. Bankruptcy Ct. for the Southern District of New York ("SDNY Bankruptcy Order") at 62a ¶ 8 (emphasis added).) For purposes of this Order, "Claims" were defined as

> all debts arising in any way in connection with any acts of the Debtors, claims (including but not limited to "claims" as that term is defined in the Bankruptcy Code), obligations, demands, guaranties, interests and matters of any kind and nature, whether arising prior to or subsequent to the commencement of these Chapter 11 cases, and whether imposed by agreement, understanding, law, equity or otherwise.

(*Id.* at 57a.)

The "free and clear" sale of Marianne Stores from debtor Petrie to Petitioner was consummated on December 17, 1998, and Marianne Stores continued in business under Petitioner's stewardship from that date forward.

Respondent Evelyn Rodríguez-Oquendo, a resident of Puerto Rico and an ex-employee of Petrie, worked between 1980 and 1988 at the Marianne Store at the Centro del Sur Shopping Center in Ponce, Puerto Rico. (App. A at 2a).) On October 5, 1998, before the sale of Marianne Stores to Petitioner, Petrie dismissed her from employment. (*Id.*)

On September 29, 1999, almost a full year after Petrie had terminated her employment, and more than nine months after Petitioner purchased Marianne Stores from Petrie, Respondent commenced civil proceedings against Petrie in the Court of First Instance of the Commonwealth of Puerto Rico, Ponce Superior Court (the "Ponce Court"), seeking $50,000 in damages for unjust dismissal, nonpayment of sums due under Puerto Rican labor statutes and age discrimination. (App. G (Complaint) at 71a-72a ¶¶ 4-11.) After a "default hearing," the Ponce Court issued judgment against Petrie on May 18, 2001 in the sum of $41,204.67

plus attorney's fees. (App. D at 47a.)

In October 2002, well after the "free and clear" sale of Marianne Stores had been made to Petitioner, Mrs. Rodríguez-Oquendo attempted to execute the judgment against Petrie by attaching two of Petitioner's bank accounts. (App. A at 3a.) Shortly thereafter, Petitioner appeared before the Ponce Court and moved to set aside this attachment on the grounds, *inter alia*, that Petitioner was not responsible for Petrie's liabilities. (*Id.*)

On January 16, 2004, the Ponce Court held that the judgment could properly be executed against Petitioners' assets on the basis that Petitioner was a "successor employer." (App. C at 45a.) Rejecting Petitioner's contention that the SDNY Bankruptcy Order extinguished any such liabilities, the Ponce Court held that "a contract executed outside this jurisdiction cannot contravene the public labor policy of Commonwealth of Puerto Rico jurisdiction." (*Id.* at 43a n.12.)

On June 4, 2004, the Puerto Rico Court of Appeals reversed, holding, by reference to the SDNY Bankruptcy Order and Section 363(f) of the Bankruptcy Code, that successor liability could not be established against Petitioner. (App. B at 24a-28a, 34a.) The Court of Appeals found Section 363(f) to have preclusive effect, endorsing Collier's observation that "[c]ourts have provided protection to purchasers of assets, who would otherwise be subject to these claims under the successor liability doctrine, by way of the approval of sales free of all present and future claims against the debtor or the estate." (App. B at 24a; *see also id.* n.2 (Section 363(f) protects "'purchasers of assets, who might otherwise be subject to such claims under principles of successor liability'") (quoting 3 *Collier on Bankruptcy* at 363-16).) The Court of Appeals continued:

> In *Nathanson v. Labor Board*, 344 U.S. 25, 29 (1952), the United States Supreme Court held that the

> purpose of the Bankruptcy Act was to achieve equality of distribution among the claimants. That is why bankruptcy courts have held that a sale of the debtor's assets, approved by the United States Bankruptcy Court as free and clear of all claims, precludes the application of the successor doctrine against a purchaser of those assets in a suit based on the debtor's alleged employment discrimination and violations of employees' civil rights. See *In re All American of Ashburn, Inc.*, 56 B.R. 186, 190 (Bkrtcy. N.D. Ga. 1986); *Rubinstein v. Alaska Pacific Consortium [(In re New England Fish Co.)]*, 19 B.R. 323, 328-329 (Bkrtcy. W.D. Wash. 1982); *Forde v. Kee-Lox Mfg. Co., Inc.*, 437 F. Supp. 631 (W.D.N.Y. 1977).

(App. B at 27a (footnote omitted).) Respondent thereupon appealed to the Supreme Court of Puerto Rico.

The Decision Below

The Supreme Court of Puerto Rico reversed, with one justice dissenting. It held that a bankruptcy sale of property free and clear of any interest in such property will not bar the application of the successor liability doctrine." (App. A at 15a.)

The court below recognized that a sale order issued pursuant to Section 363(f) might, if it were broadly construed, operate to "preclude[] the application of the *successor liability* doctrine against the asset purchaser." (App. A at 12a.) The court held, however, that "our caselaw precedents" on the doctrine of successor liability were not rendered inapplicable by the federal Bankruptcy Code or the SDNY Order. (*Id.* at 15a.) It rejected the Court of Appeals' reliance upon Section 363(f) (and case law decided thereunder) as a bar to successor liability, finding that "another string of weightier federal cases has questioned the bankruptcy courts' authority to override the application of the

successor liability doctrines developed by state courts." (*Id.* at 13a (citing *Collier Bankruptcy Manual*, 3d ed. 2002, ¶ 363.02[3], p. 363-10); *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714 (1st Cir. 1994); and *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994)).

The court below noted that there were "two main reasons" commonly proffered in support of a broad view of Section 363(f): (1) the need to preserve the scheme of priorities established by the Bankruptcy Code; and (2) "that the implementation of the successor liability doctrine would have a negative impact on the trustee's ability to sell assets of the estate at a fair price." (*Id.* at 13a-14a.) In dismissing these concerns, the court quoted at length the Seventh Circuit's opinion (written by Judge Posner) in *Zerand-Bernal*:

> If the [bankruptcy] court could do all these nice things the result would indeed be to make the property of bankrupts more valuable than other property – more valuable to the creditors, of course, but also to the debtor's shareholders and managers to the extent that the strategic position of the debtor in possession in a reorganization enables the debtor's owners and managers to benefit from bankruptcy. But the result would not only be harm to third parties . . . but also a further incentive to enter bankruptcy for reasons that have nothing to do with the purposes of bankruptcy law.

(App. A at 14a-15a (citing *Zerand-Bernal*, 23 F.3d at 163).)

The court below embraced the Seventh Circuit's reasoning and the cases that "refuse[] to acknowledge a limitation in the application of different successor liability doctrines simply because the sale of assets took place in the context of a bankruptcy proceeding." (*Id.* at 15a.) The court concluded that cases rejecting federal bankruptcy limits to successor liability were "better supported by federal

caselaw" in the bankruptcy area. (App. A at 15a.)

The court below also found such cases refusing to abrogate the doctrine of successor liability to be "in tune with 'important labor-related public policies that conform to our economic, social, and cultural reality.'" *(Id.)* The court noted its regard for "the *successor employer doctrine* as it has been applied in our jurisdiction" and its unwillingness to "ignore completely . . . our own precedents on a doctrine adopted in our jurisdiction since the 1960's." (*Id.* at 10a-11a.)

> We therefore hold that *the sale of assets under a federal bankruptcy proceeding, though free of liens, will not bar the application of the successor employer doctrine as developed by our caselaw precedents.*

(App. A at 15a (emphasis in original).)

Finding no federal bankruptcy law bar to successor liability, the court below proceeded to apply its own common law precedents concerning the doctrine to conclude that Respondent could seek to hold Petitioner liable under the doctrine of successor liability because Respondent "*had no knowledge of the transfer of [Marianne Stores] assets*" to Petitioner and "*the employer's corporate structure* was unknown to [Respondent]." (*Id.* at 17a (emphasis in original).[1]

On April 27, 2006, Petitioner moved for reconsideration of this decision, repeating its argument that federal circuit

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[1] The court below, having dispensed with all federal issues, held that Respondent had not received sufficient notice of the SDNY Bankruptcy Order, but this finding was confined to a separate state law issue, *i.e.*, whether Puerto Rican "successor employer" liability applied to Petitioner. *Cf. In re All American of Ashburn, Inc.*, 56 B.R. 186, 190 (Bkrtcy. N.D. Ga. 1986) ("The Court will, however, consider the issue of notice to the [successor liability claimants] to the extent that it may be relevant to the application of the successor doctrine [under Georgia law].").

precedent required that the court give effect to the SDNY Bankruptcy Order as barring successor liability claims. On May 23, 2006, the Supreme Court of Puerto Rico issued its decision denying Petitioner's reconsideration motion. (App. F.) Two justices would have granted reconsideration. (*Id.*)

REASONS FOR GRANTING THE PETITION

The court below held that a federal bankruptcy court's sale order, made pursuant to Sections 105(a) and 363(f) of the federal Bankruptcy Code, may not validly extinguish the successor liability of the purchaser of those assets. Thus the decision below squarely and expressly conflicts with decisions of the Third and Fourth Circuits, which have construed Section 363(f) as empowering a district court to authorize a sale of debtor property "free and clear" of any "claims" that otherwise might have attached to the purchaser under common law or similar doctrines of "successor liability." *See In re Trans World Airlines*, 322 F.3d 283, 289-90 (3d Cir. 2003); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co)*, 99 F.3d 573, 582 (4th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997).

The narrow effect given to Section 363(f) by the court below, which joins the Seventh Circuit, *see Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), and two other state supreme courts[2] on this issue, ignores the plain language of the statute. Section 363(f) expressly authorizes bankruptcy sales "free and clear" of competing "interests" in the subject "property" and, therefore, on its face confers

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[2] *See Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213, 215 (S.C. 2005) (court holding that "successor liability" claims survive bankruptcy sale) *see id.* at 225 (Barnett, J., concurring in relevant part) (Section 363(f) does not reach "successor liability" claims); *Lefever v. K.P. Hovnanian Enters., Inc.*, 734 A.2d 290, 317-18 (N.J. 1999) (Section 363(f) does not "cut off product liability claims).

power on bankruptcy courts to issue orders cleansing assets of potential successor claims.

The decision below frustrates important federal statutory policies enshrined in the Bankruptcy Code. The statutory power to cleanse assets of successor liability not only benefits creditors by increasing the potential value of a debtor's assets for sale, but it is also makes bankrupt businesses more viable going forward. In light of Congress's long-standing goal of integrating Puerto Rico into the national economy, the decision below is especially harmful because it creates disincentives for a party to purchase a debtor's assets in Puerto Rico.

The wide circuit and state court split presented by this Petition is now ripe for resolution. As long as the split in authority is unresolved by this Court, there will remain significant confusion and uncertainty in all federal bankruptcy sales. Even when bankruptcy sales take place in jurisdictions that allow successor liability claims to be extinguished, enterprising litigants may bring "successor liability" claims against the purchaser in another jurisdiction such as that of the court below. Standing alone, this risk depresses the potential return on *any* bankruptcy sale in a situation where, as here, the sold business operates in different parts of the country.

The Court should grant this petition to resolve the split in authority on this important issue of federal bankruptcy law.

I. The Decision Below Squarely Conflicts With Precedent of the Third and Fourth Circuits

A. The Third and Fourth Circuits Have Held that Section 363(f) Orders Can Extinguish "Successor Liability" Claims

The holding of the decision below, that "the sale of assets under a federal bankruptcy proceeding, though free of liens, will not bar the application of the successor employer

doctrine as developed by our caselaw precedents" (App. A at 15a (emphasis in original)), is in direct conflict with decisions of the Fourth and Third Circuits which hold that a "free and clear" sale order issued under Section 363(f) may validly extinguish "successor liability."

In *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co)*, 99 F.3d 573, 582 (4th Cir. 1996), eight coal-mining companies were subject to Chapter 11 proceedings before a West Virginia bankruptcy court. *See id.* at 577-78. Each of the mines operated by the bankrupt companies had ongoing liabilities under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* (the "Coal Act"), to fund retirement benefits for former mine employees. 99 F.3d at 575-76. To prevent these obligations from possibly attaching to the new mine owners, the bankruptcy court was requested to grant, and granted, a Section 363 bankruptcy sale order permitting the mines to be sold "free and clear of [all] liabilities" under the Coal Act. *Id.* at 577. The Fourth Circuit held that the various Coal Act funds' rights to collect Coal Act payments from the incoming mine owners were "interests in . . . property" for purposes of Section 363(f) because those claims were "grounded, at least in part, in the fact that those very assets have been employed for coal-mining purposes." *Id.* at 582. Thus, according to the Fourth Circuit, the bankruptcy court had jurisdiction to make an order "extinguish[ing] Coal Act successor liability pursuant to 11 U.S.C. § 363(f)." *Id.* at 585.

The Third Circuit similarly held that "free and clear" orders pursuant to Section 363(f) may validly extinguish successor liability claims. *See In re Trans World Airlines*, 322 F.3d 283, 289-90 (3d Cir. 2003). During a Chapter 11 reorganization, TWA negotiated to sell its airline business to American Airlines ("AA") net of any prior liabilities arising from past employment discrimination claims. *See* 322 F.3d at 286 & n.1. The Delaware bankruptcy court granted a

requested order "extinguish[ing] successor liability on the part of [AA]" for these liabilities. *Id.* at 286. On appeal, the Third Circuit held that past discrimination claims, to the extent they might be transferred to AA as "successor" employer, were "interests in property" capable of being extinguished by a Section 363(f) order because "'the term 'any interest' is intended to refer to obligations that are connected to, or arise from, the property being sold.'" *Id.* at 289 (citation omitted)). Thus, the Third Circuit held that the Delaware bankruptcy court possessed the power, through Section 363(f), to extinguish successor liability for past employment discrimination claims against TWA. *Id.* at 290, 293.[3]

The Third and Fourth Circuits' approach to Section 363(f) in *TWA* and *Leckie* is in accord with considerable lower court authority and scholarly literature. *First*, several bankruptcy court decisions pre-dating *Leckie* and *TWA* held that Section 363(f) orders could validly extinguish "successor" liability.[4] *Second*, numerous district courts from other Circuits have expressly followed *TWA* and/or *Leckie*,

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[3] The Third Circuit in *TWA* also held that an unsecured claim (such as Respondent's) falls within the scope of Section 353(f)(5) in that they could be "compelled" to accept monetary settlement of such claims. *See TWA*, 322 F.3d at 290-91 (noting that, had the Chapter 11 debtor "liquidated its assets under Chapter 7 of the Bankruptcy Code, the [employment discrimination] claims at issue would have been converted to dollar amounts and the claimants would have received the distribution provided to other general unsecured creditors on account of their claims").

[4] *See, e.g., In re Dow Corning Corp.*, 198 B.R. 214, 244-47 (Bankr. E.D. Mich. 1996) (Section 363(f)'s conferral of power to sell property "free and clear" of claimed "interests" should confer an "inherent" power to "enjoin" litigation against the purchaser of that property); *All Am. of Ashburn, Inc.*, 56 B.R. at 189-191; *In re P.K.R. Convalescent Ctrs.*, 189 B.R. 90, 92-94 (Bankr. E.D. Va. 1995); *WBQ Partnership v. Commonwealth of Virginia Department of Medical Assistance Services (In re WBQ Partnership)*, 189 B.R. 97, 105 (Bankr. E.D. Va. 1995)

or construed Section 363(f) in a similarly broad manner.[5] *Third*, the result in *TWA* and *Leckie* is consistent with decisions addressing the Bankruptcy Code's statutory predecessors, which this Court interpreted as conferring on the trustee an *implied* power to "sell property of the bankrupt free from encumbrances." *Van Huffel v. Harkelrode*, 284 U.S. 225, 227 (1931). Under the old Bankruptcy Act, this implied power had been utilized by bankruptcy courts to craft sale orders that extinguished successor liability for past discrimination claims.[6] *Fourth*, several courts have held that, regardless of the reach of Section 363(f), the power to extinguish successor liability claims may validly be derived from Section 105(a), authorizing a court to issue any "order" that is "necessary or appropriate to carry out the provisions of [title 11]." 11 U.S.C. § 105(a).[7] *Fifth*, *Leckie* and *TWA*

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[5] *See Myers v. United States,* 297 B.R. 774, 782 (S.D. Cal. 2003) (applying *TWA*; holding that a Delaware bankruptcy court's order, issued pursuant to Section 363(f) and authorizing a sale of debtor's asset "free and clear of all Claims of any kind or nature whatsoever," validly extinguished all environmental contamination claims that might have attached to the purchaser of a parcel of real estate under California's "successor liability" doctrine); *In re Med. Software Solutions*, 286 B.R. 431, 446-47 (Bankr. D. Utah 2002) (Section 363(f) order validly extinguished "successor liability" claims).

[6] *See Forde v. Kee-Lox Manuf. Co.*, 437 F. Supp. 631, 632-35 (W.D.N.Y. 1977), *aff'd*, 584 F.2d 4 (2d Cir. 1978) (court order stating that a bankruptcy sale would be "free and clear of liens, including tax liens, if any, claims, encumbrances, demands and rights of creditors, or any other person, all of his right, title and interest, in and to [the purchased assets]" applied to, and extinguished, any "successor" liability for the bankrupt's past Civil Rights violations); *Med. Software Solutions*, 286 B.R. at 446 ("Indeed, even before the Bankruptcy Code was enacted in 1978, courts relied on their general equitable powers to authorize the sale of assets free and clear [of successor liability].").

[7] *See Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987); *Rubenstein v. Alaska Pac. Consortium (In re New England Fish Co.)*, 19 *(cont'd)*

find support in the most authoritative text in bankruptcy, *Collier on Bankruptcy*, which considers that they represent the prevailing "trend."[8]

The court below did not find *TWA* or *Leckie* distinguishable; on the contrary, the court accepted that the "string of cases" of which those decisions were a part "indeed" stood for the opposite conclusion from that reached below. (App. A at 12a; *see also* App. F (denying motion for reconsideration despite *TWA* and *Leckie*.) This Petition thus presents an exemplary case of both "a state court of last resort . . . decid[ing] an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," U.S. Sup. Ct. Rule 10(b),[9] and also of "a state court . . . decid[ing] an important question of federal law that has not been, but should be, settled by this Court. . . ." *Id.* Rule 10(c). In light of the express conflict acknowledged by the court below, a writ of certiorari is warranted.

(cont'd from previous page)
B.R. 323, 328-29 (Bankr. W.D. Wash. 1982).

[8] *See* 3 *Collier on Bankruptcy* ¶ 363.06[1], at 363-47 (Alan N. Resnick et al, eds.) ("[a]lthough some courts have limited the term [interests in property] to *in rem* interests in the property, the trend seems to be in favor of a broader definition that encompasses other obligations that may flow from ownership of the property." (footnote omitted)); *see also* William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use of Successor Liability to Create a New Class of Priority Claimants*, 4 Am. Bankr. Inst. L. Rev. 325, 345, 353 (1996) (criticizing decisions that frustrate a debtor's decision to "cleanse" assets in a bankruptcy sale utilizing Section 363(f); commenting that "[u]ntil Congress chooses to act, state successor liability law, which frustrates the terms of a court-approved bankruptcy sale, is preempted by the Bankruptcy Code and the Supremacy Clause of the Constitution").

[9] For purposes of the Rules of this Court governing the grant of certiorari, the Supreme Court of Puerto Rico is deemed a "state court." U.S. Sup. Ct. Rule 47.

B. The Split in Authority on this Issue is Wide and Deep, and Ripe for Resolution by this Court

Resolution of the conflict now is warranted. The court below, in addition to issuing a decision that conflicts with the Third and Fourth Circuits, joins the Seventh Circuit and the Supreme Courts of South Carolina and New Jersey in its resolution of the question presented.

In *Zerand-Bernal*, the Seventh Circuit stated that Section 363(f) may not extinguish successor liability claims. Plaintiff/purchaser bought a manufacturing business pursuant to an Illinois bankruptcy court's sale order "provid[ing] for the enjoining of any products liability claims against [the plaintiff/purchaser] that related to equipment sales which had occurred before the sale to it of [the prior owner's] assets." 23 F.3d at 161. Later, an individual in Pennsylvania, who had been injured by the prior owner's negligence, brought products liability claims against plaintiff/purchaser based on "successor liability." *Id.* Plaintiff/purchaser responded by seeking to revive the Illinois bankruptcy proceedings in order to enjoin those Pennsylvania products liability claims. *Id.*

After rejecting plaintiff/purchaser's claims for lack of subject-matter jurisdiction, *see id.*, the Seventh Circuit wrote that courts do not "enjoy[] a blanket power to enjoin all future lawsuits against a buyer at a bankruptcy sale in order to maximize the sale price" and that a sale of assets pursuant to Section 363(f), "free from all liens and other encumbrances," was not applicable to cases where a claimant "[was] not attempting to enforce a lien." *Id.* at 163 (citing *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.)*, 730 F.2d 367, 374-75 (5th Cir. 1984)).

The Seventh Circuit's observations in *Zerand-Bernal* on the application of Section 363(f) are arguably dictum, but the reasoning and statements were cited with approval by the court below as supporting its conclusion that a bankruptcy

sale order is not capable of extinguishing "successor liability" claims.

The decision below also joins the ranks of decisions from the highest courts of South Carolina and New Jersey. The Supreme Court of South Carolina has held that assets purchased at a bankruptcy sale are not protected from "successor liability" claims. *See Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213, 213 (S.C. 2005); *see also id.* at 225 (Burnett, J., concurring in relevant part and dissenting in other respects) ("I find more persuasive the views expressed by several courts which have held that a successor may be held strictly liable in a state law product liability claim despite a bankruptcy court order or purchase agreement purporting to discharge such liability"; citing, *inter alia*, *Zerand-Bernal*, 23 F.3d at 161-64, as "suggest[ing] that § 363(f) may not be used to extinguish successor product-line claims.").

In addition, the Supreme Court of New Jersey has held (based on a Texas federal district court case which, in turn, cites *Zerand-Bernal*) that Section 363(f) does not "cut off product liability claims." *See Lefever v. K.P. Hovnanian Enters., Inc.*, 734 A.2d 290, 317-18 (N.J. 1999) (citing *Fairchild Aircraft, Inc. v. Cambell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910, 917-78 (Bankr. W.D. Tex. 1995) (*citing Zerand-Bernal*), *vacated as moot on equitable grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998)).

In light of the substantial authority on both sides of the issue, the question presented in this Petition will not be further refined or resolved by allowing it to further percolate among the circuit or state courts. The conflict has fully matured and is now ripe for review: the Third and Fourth Circuits (and numerous district courts) give preclusive effect to Section 363(f) with regard to common law successor liability claims; the Seventh Circuit and the highest courts of Puerto Rico, New Jersey and South Carolina do not.

II. The Interpretation of Section 363(f) By the Court Below Undermines Important Federal Statutes and Policies

A. The Decision Below Ignores the Statute's Plain Language

To hold that Section 363(f) is incapable of extinguishing successor liability claims is to ignore the plain language of the statute. Section 363(f) expressly authorizes bankruptcy sales "free and clear" of competing "interests" in the subject "property" and, therefore, on its face confers power on bankruptcy courts to issue orders cleansing assets of potential successor claims.

The Third and Fourth Circuits' decisions in *TWA* and *Leckie* focus, first and foremost, on the operative words of Section 363(f). They recognize that the phrase "interest in . . . property," by its plain terms, embodies a broad concept which, while not unlimited, is not on its face confined to *in rem* interests or liens. *See Leckie*, 99 F.3d at 583; *accord TWA*, 322 F.3d at 290. "Indeed, to equate interests in property with only *in rem* interests such as liens would be inconsistent with section 363(f)(3), which contemplates that *a lien is but one type of interest*" that can be extinguished in a bankruptcy sale. *TWA*, 322 F.3d at 290 (citing 28 § U.S.C. 363(f)(3)) (emphasis added).

In sharp contrast, neither the court below nor the Seventh Circuit in *Zerand-Bernal* conducted a detailed textual analysis in support of their conclusions that Section 363(f) is incapable of extinguishing successor liability. Rather, they based their reasoning primarily on two *non-textual* considerations. First, they stated that it would be socially undesirable to permit Section 363(f) to be utilized to cleanse debtor assets of successor liability. Second, they expressed concern that a Section 363(f) order might be made without giving due notice to all affected parties who might have potential "successor liability" claims against the purchaser.

(*Zerand-Bernal*, 23 F.3d at 163; App. at 13a-15a.) Neither consideration is relevant to the issue of what Section 363(f) actually says – and means.

B. The Decision Below Undermines Important Public Policies Enshrined in the Bankruptcy Code

The decision below undermines the carefully crafted priority scheme and important public policies enshrined in the Bankruptcy Code.

1. Maximizing Value of Debtors' Assets to Further Interests of Creditors and Employees

TWA and *Leckie* aptly illustrate the policy objectives furthered by Section 363(f) orders that cleanse assets of "successor liability" claims. In *TWA*, the evidence showed that "the sale of TWA's assets to [AA] at a time when TWA was in financial distress *was likely facilitated by [AA] obtaining title to the assets free and clear of these civil rights claims.*" *Id.* at 292 (emphasis added). Absent the Section 363(f) order, "[AA] may have offered a discounted bid." 322 F.3d at 293. Likewise, in *Leckie*, the evidence showed as to one of the coal mines that, if the incoming purchaser had not been able to purchase the mine (valued at $1.9 million) free of the Coal Act obligations (which stood at $7 million), "the assets would almost inevitably have [had] to be sold piecemeal, thereby generating fewer funds" to satisfy creditors. 99 F.3d at 586-87.

As the chief bankruptcy judge of the Eastern District of Virginia observed:

> the purpose behind the "free-and-clear" language is to maximize the value of the asset, and thus enhance the payout made to creditors. Without the "free-and-clear" language, prospective buyers would be unwilling to pay a fair price for the property subject to sale; instead, the price would have to be discounted,

> perhaps quite substantially, to account for the liabilities that the buyer would face simply as a result of acquiring the asset. . . . A discounted price would reduce the return to the estate to the detriment of the creditors involved in the case. The "free-and-clear" language avoids this kind of prejudice by providing the buyer with what is essentially a fully marketable title.

WBQ P'ship v. Commonwealth of Virginia Dep't of Med. Assistance Servs. (In re WBQ P'ship), 189 B.R. 97, 108 (Bankr. E.D. Va. 1995) (citation omitted); *accord Med. Software Solutions*, 286 B.R. at 447; William T. Bodoh et al, *supra*, n.8 (describing Section 363(f)'s capacity to "cleanse" debtor assets of all possible claims).[10]

But the public policies that favor maximizing the sale price of bankrupt assets not only benefit creditors; they also serve broader community interests, especially when the asset is a continuing business. Thus, in *TWA*, the Third Circuit found that the Section 363(f) order, extinguishing "successor liability" for employee discrimination claims, inured to the benefit of TWA's workforce as a whole:

> Given the strong likelihood of a liquidation absent the asset sale to [AA], a fact which appellants do not

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[10] Courts relying on Section 105(a) as the basis ordering a sale "free and clear" of successor liability have also based this on public policy. *See White Motor*, 75 B.R. at 950-51 ("[t]he successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability[;] [t]his negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code."); *New England Fish*, 19 B.R. at 328-29 (the purchaser "would not and will not take the business burdened with civil rights litigation. No purchaser would. Such a prospect would chill or render impossible any sale. . . . [Any] impediments [to the claimants] are far outweighed by a policy encouraging bankruptcy sales . . . . ").

> dispute, we agree with the Bankruptcy Court that a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of [the Travel Voucher Program class] and the EEOC claimants still employed by TWA, and to provide funding for employee-related liabilities, including retirement benefits.

322 F.3d at 293.

2. Maintaining Priority Scheme of Federal Bankruptcy Code

Moreover, the decision below undermines the priority scheme of the federal Bankruptcy Code by elevating the claims of those pressing successor liability claims over other general claimants of a debtor's property.

Under the Bankruptcy Code, the interests of claimants who wish to press "successor liability" claims – which, in the final analysis, are "general unsecured claims" ordinarily "accorded low priority," *see TWA*, 322 F.3d at 292 – should not be elevated above all other stakeholders in a bankruptcy. To permit such claimants to "'assert their claims against purchasers of the bankrupt's assets, while relegating lienholders to the proceeds of the sale" would "'elevate claims that have not been secured or reduced to judgment to a position superior to those that have.'" *Id.* (quoting *Forde v. Kee-Lox Manuf.*, 437 F. Supp. 631, 633 (W.D.N.Y. 1977)). Thus, "[t]o allow . . . claimants to assert successor liability claims against [an incoming purchaser] while limiting other creditors' recourse to the proceeds of the asset sale *would be inconsistent with the Bankruptcy Code's priority scheme*." 322 F.3d at 292 (emphasis added); *accord In re All American of Ashburn, Inc.*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) ("There is no suggestion of Congressional intent to apply the successor doctrine to elevate product liability claims above their status under the Bankruptcy Code."). As the Puerto

Rico Court of Appeals held in the proceedings below, this Court's decisions under the prior bankruptcy legislation counsel against such a result. (*See* App. B at 27a (citing *Nathanson v. Labor Board*, 344 U.S. 25, 29 (1952).)

3. Ensuring National Uniformity

The differing standards now applied by the circuits and state courts (including the courts of Puerto Rico) undermine the "national purpose to establish uniformity" of the Bankruptcy Code, *Int'l Shoe Co v. Pinkus*, 278 U.S. 261, 265 (1929), and foster extreme uncertainty concerning the bankruptcy process.

The Bankruptcy Code is a statute of vital economic importance. It serves the constitutionally-enshrined goal of creating *"uniform Laws on the subject of Bankruptcies throughout the United States."* U.S. Const., art. I, § 8, cl. 4. So long as the effect of a Section 363(f) "free and clear" order upon successor liability is open to debate, the price obtainable in a bankruptcy sale will be depressed; the potential recovery for creditors will be diminished; the debtor (or trustee's) negotiation position will be weakened; and the ongoing viability of a bankrupt business will be compromised. The effect of this disparate treatment is especially pernicious where, as here, the sold business operates in numerous states. Even after a Section 363(f) order has been issued, identical "successor liability" claims in different parts of the country may generate different kinds of exposure, an anomalous result antithetical to the constitutional goal of having uniform bankruptcy laws. Indeed, as long as there are *some* jurisdictions that permit "successor liability" claims to survive a Section 363(f) cleansing order, enterprising plaintiffs will contrive to bring their "successor liability" claims in those more permissive jurisdictions.

C. The Decision Below Frustrates Congress's Goal of Integrating Puerto Rico into the National Economy

It is Congress's intention "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. v Flores de Otero*, 426 U.S. 572, 594 (1976).[11] Congress has given Puerto Rico the same functional *economic* status as a state.[12] Thus, "[f]ull economic integration is as important to Puerto Rico as to any state in the Union." *Trailer Marine Trans. Corp. v. Rivera Vazquez*, 977 F.2d 1, 8 (1st Cir. 1992).

The extension of the Bankruptcy Code to Puerto Rico is a critical (indeed indispensable) part of that legislative program. *See In re Segarra*, 14 B.R. at 872. Indeed, the federal Bankruptcy Code is the exclusive source of bankruptcy law throughout the United States, including

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[11] *See* 48 U.S.C. § 734 ("[t]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States, except [certain] internal revenue laws"); *In re Segarra*, 14 B.R. 870, 872-73 (D.P.R. 1981) (noting that 48 U.S.C. § 734 "codif[ies]" "[t]he policy of treating Puerto Rico on the same basis as a state for the purpose of determining if federal legislation is applicable in Puerto Rico" and that pursuant to that section, "the Bankruptcy Reform Act of 1978 is a statutory law not locally inapplicable and thus extensive to Puerto Rico"); 28 U.S.C. § 152 (establishing two bankruptcy court districts in Puerto Rico)

[12] Federal courts have applied core U.S. commercial legislation to Puerto Rico on the same basis as if it were a state. *Trailer Marine*, 977 F.2d at 8 (finding that dormant Commerce Clause applies within Puerto Rico); *Used Tire Int'l, Inc. v. Diaz Saldana*, No. 97-1028, 1997 U.S. Dist. LEXIS 14016, at *28 (Sept. 8, 1997) (federal antitrust laws applicable within Puerto Rico), *aff'd*, 155 F.3d 1 (1st Cir. 1998). In a different context, this Court refused to permit Puerto Rico to erect a separate customs border. *Torres v. Puerto Rico*, 442 U.S. 465, 472 (1979); *see also, e.g.*, 48 U.S.C. § 738 (barring tariffs or trade blockages with the mainland); 48 U.S.C. § 741a (same).

Puerto Rico.[13]

The decision below threatens to disrupt that important federal policy by throwing Puerto Rico's interpretation of a core bankruptcy principle into disharmony with the majority of states, and by creating disincentives for entities to purchase a debtor's assets in Puerto Rico. A grant of certiorari to correct the court's anomalous construction of section 363(f) would further the Congressional goal of integrating and supporting the economy of Puerto Rico.

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[13] The provisions of the Bankruptcy Code pre-empt any inconsistent doctrine of Puerto Rican common law. "Although Puerto Rico has a unique status in our federal system, *see, e.g., Examining Board v. Flores de Otero*, 426 U.S. 572, 596 . . . (1976) . . . the test for federal pre-emption of the law of Puerto Rico . . . is the same as the test under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, for pre-emption of the law of a State." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). As to the pre-emptive effect of Section 363(f), *see, e.g., Myers*, 297 B.R. at 784 ("I find that the Bankruptcy Code preempts California state law in this case regarding successor liability."); *WBQ P'ship*, 189 B.R. at 108 (finding that a Virginia depreciation-recoupment law "actually conflict[ed] with . . . 11 U.S.C. § 363(f) by 'stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" and was therefore pre-empted by Section 363(f)) (first alteration added).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Dated: October 20,
2006

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF PUERTO RICO DATED APRIL 11, 2006

IN THE SUPREME COURT OF PUERTO RICO

No. CC-2004-900 Certiorari

Evelyn Rodríguez Oquendo,

Plaintiff and petitioner

v.

Petrie Retail Inc. D.I.P., and/or Centro Retail Apparel Corporation, D/B/A Marianne,

Defendants

Urban Brands, Inc.,

Respondent

JUSTICE FUSTER BERLINGERI delivered the opinion of the Court.

San Juan, Puerto Rico, April 11, 2006

We must determine, among other things, *whether the sale of assets "free of liens" under a federal bankruptcy proceeding precludes the application of the successor employer doctrine to a claim for wrongful discharge.*

Appendix A

I

Evelyn Rodríguez Oquendo (plaintiff or petitioner) was an employee of the Tiendas Marianne store located at the Centro del Sur Shopping Center in Ponce from April 14, 1980, to October 5, 1998, when she was discharged. At the time of her discharge, she worked as Assistant Manager. According to the findings of fact drawn by the Court of First Instance, she was replaced by a younger woman.

On September 29, 1999, plaintiff filed a labor claim against Petrie Retail, Inc. (Petrie),[1] the corporate owner of Tiendas Marianne in Puerto Rico, alleging that she had been discharged from her job without just cause and that she had been discriminated against because of her age.

Summons was issued on October 5, 1999, in the name of Petrie, and served on October 15 on Maritza Ruiz Vélez, manager of the Marianne store located at Centro del Sur Shopping Center. As said manager acknowledged in her testimony, immediately after receiving the summons, she contacted the main offices of Tiendas Marianne and forwarded the mentioned documents.

Petrie did not appear at the trial and, on plaintiff's motion, default was entered against it on May 25, 2000. The trial was held and the Court of First Instance, Superior Court

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1. Plaintiff also included *Centro Apparel Corporation* because, as shown by the income withholding statements issued by the Department of the Treasury and the check stubs on record, the employer occasionally identified itself as that corporate entity.

of Ponce, entered default judgment for plaintiff and ordered Petrie to pay plaintiff $11,204.67 as penalty for wrongful discharge under Act No. 80 of May 30, 1976,[2] plus $30,000 for age discrimination. A copy of the notice of judgment was filed in the record of the case on June 7, 2001, and on March 13, 2002, plaintiff moved the Court of First Instance to order the execution of said judgment. On September 16, 2002, the court issued the order of execution of judgment, ordering the attachment of two bank accounts as requested.

On October 23, 2002, Urban Brands, Inc. (Urban or respondent) appeared before the Court of First Instance—without submitting to its jurisdiction—and asked the court to set aside the attachment and to stay the execution of judgment. Respondent alleged that the attached bank account belonged to it[3] and that it had purchased the assets of Tiendas Marianne from Petrie as part of a bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of New York, without assuming liability for any of the debts of said corporation. Urban contended that the transaction was *free of liens* and that the service of the summons was insufficient because the summons was addressed to Petrie. Respondent further argued that even if the summons had been correctly served, the judgment was notified to Petrie—not to Urban—and, therefore, it was not final and unappealable and its execution did not lie.

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2. 29 L.P.R.A. § 185 *et seq.*

3. One of the accounts was from Scotiabank de Puerto Rico and the other from Banco Popular de Puerto Rico. The funds deposited in the latter account were not attached because the account number on the attachment order was incorrect.

Appendix A

Plaintiff-petitioner did not know that as part of the bankruptcy proceedings, Petrie had transferred its assets in Tiendas Marianne to respondent Urban ten months before the service of summons—that is, two months after plaintiff's discharge.

The Court of First Instance held several hearings to determine whether it was proper to set aside the attachment and the execution of judgment. At those hearings—which Urban attended without submitting to the jurisdiction of the court—both parties presented evidence and arguments in support of their positions. By resolution of January 16, 2004, the trial court determined that Urban was Petrie's successor employer and, consequently, denied the motion to set aside the attachment and stay the execution of judgment.

Aggrieved by that ruling, Urban filed a brief entitled "Civil Appeal" in the Circuit Court of Appeals, essentially alleging that the Court of First Instance had erred in: (1) finding that Urban had been duly summoned; (2) finding that Urban was Petrie's successor employer; and (3) authorizing the withdrawal of the funds attached in execution of the judgment before the resolution became final and unappealable.

The Court of Appeals accepted Urban's appeal as a petition for certiorari and, judgment of June 4, 2004, reversed the trial court's decision. The appellate court was persuaded by respondent's contentions that: (a) the acquisition of assets free of liens as part of a bankruptcy proceeding barred the application of the successor employer doctrine; and (b) even if there had been no bar to the application of said doctrine,

the evidence presented was not sufficient to prove that it had to be applied to this case. The intermediate court also determined that Urban had not been duly summoned and, therefore, the court never acquired jurisdiction over it.[4]

Plaintiff Rodríguez Oquendo filed a motion for reconsideration in the appellate court, which denied it by way of a resolution notified on September 3, 2004. Aggrieved, plaintiff timely resorted to this Court, essentially alleging that the appellate court had erred in reversing the resolution of the Court of First Instance because Urban was liable for the discriminatory discharge under the successor employer doctrine. Petitioner also argued that Urban had been summoned according to law and that the judgment had been duly notified.

On January 21, 2005, we issued the writ of certiorari. On March 18, 2005, having requested and obtained an extension of time, petitioner filed a brief in support of her petition for certiorari. Respondent, which also sought and obtained an extension of time, filed its brief on April 25, 2005. We are ready to adjudicate.

II

A. The *successor employer doctrine* was incorporated four decades ago into our legal system by caselaw—through United States common law—to address cases in which a change of owners in a business operation makes it necessary

4. In its judgment, the Court of Appeals discussed the contention raised by Urban Brands, Inc. (Urban) that notice of the judgment had not been served on it, but on Petrie Retail, Inc. (Petrie).

to determine the employees' rights under the new employer. When this doctrine is applicable, it is understood that an employer who replaces another through a transfer of assets or a corporate merger will assume the obligations contracted by the previous employer. *Piñeiro v. Int'l Air Serv. of P.R., Inc.*, 140 D.P.R. 343 [40 P.R. Offic. Trans. __] (1996); *Bruno López v. Motorplan, Inc. y otros,* 134 D.P.R. 111 [34 P.R. Offic. Trans. __] (1993); *J.R.T. v. Asoc. C. Playa Azul I,* 117 D.P.R. 20 [17 P.R. Offic. Trans. 25] (1986); *L.R.B. v. Cooperativa Azucarera,* 98 P.R.R. 307 (1970); *L.R.B. v. Club Náutico,* 97 P.R.R. 376 (1969). The adoption and development of this doctrine addresses "the need to establish a balance between the employers' right to 'independently rearrange their business' and to recognize 'some protection to the employees from a sudden change in the employment relationship.'" *L.R.B. v. Cooperativa Azucarera,* 98 P.R.R. at 318 (citing *John Wiley & Sons v. Livingston,* 376 U.S. 543 [, 549] (1964)).

The successor employer doctrine originally developed in the United States Supreme Court and in other federal courts, in which it is known as "successor liability." The doctrine was initially limited to enforcing collective bargaining agreements, particularly in dealing with arbitration provisions. *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964); *United Steelworkers of Amer. v. Reliance Univ., Inc.,* 335 F.2d 891 (3d Cir. 1964); *Wackenhut Corp. v. International U., United Plant Guard W.,* 332 F.2d 954 (9th Cir. 1964). Likewise, in Puerto Rico, we initially incorporated the doctrine to resolve controversies involving collective bargaining agreements and unfair labor practices. *J.R.T. v. Asoc. C. Playa Azul I,* 117 D.P.R. 20 [17 P.R. Offic.

Trans. 25] (1986); *L.R.B. v. Cooperativa Azucarera,* 98 P.R.R. 307 (1970); *L.R.B. v. Club Nautico,* 97 P.R.R. 376 (1969). See also 2 Demetrio Fernandez and Celina Romany, *Derecho laboral: casos y materiales* 1265-1324, Rio Piedras, Ed. U.P.R. (1987).

Federal courts subsequently extended the scope of the successor liability doctrine to controversies involving discriminatory discharges under social legislation protective of labor. *EEOC v. Vucitech,* 842 F.2d 936 (7th Cir. 1988); *Bates v. Pacific Maritime Ass'n,* 744 F.2d 705 (9th Cir. 1984); *In re National Airlines, Inc.,* 700 F.2d 695 (11th Cir. 1983); *Equal Emp. Op. Com'n v. MacMillan Bloedel Containers, Inc.,* 503 F.2d 1086 (6th Cir. 1974). This extension of the doctrine was justified when it was affirmed that the public policy against the discriminatory discharge of workers was as important as the public policy on the right to collective bargaining and the ban on unfair labor practices.

In *Bruno Lopez,* this Court held that in our jurisdiction, the *successor employer doctrine* extends to claims for discriminatory discharge, which have a higher rank in our legal system. This type of discrimination is constitutionally and statutorily prohibited. Thus, in *Piñeiro,* at 349 [40 P.R. Offic. Trans. at __], we explained that "we have extended the successor employer doctrine in aid of the judicial responsibility to enforce, in concrete cases, important labor-related public policies that conform to our economic, social, and cultural reality."

Since we adopted the mentioned doctrine, we have acknowledged that "[t]he factors which have been considered

in order to hold an entity liable for the unfair practices committed by another are varied." *L.R.B. v. Club Nautico,* 97 P.R.R. at 390. As a minimum, a substantial similarity is required "in the operation and continuity of the identity of the enterprise before and after the change ... so that it be considered that the new employer shall assume obligations contracted by the previous employer." *L.R.B. v. Cooperativa Azucarera,* 98 P.R.R. at 316. In the aforecited opinion, we held that Cooperativa Azucarera Central Juncos was the successor employer of a company that had entered into a collective bargaining agreement with the Asociacion de Azucareros Profesionales and, as such, had assumed the obligations contracted in said agreement. In so holding, we pointed out that a combination of an adequate number of the following factors was conclusive when attributing the continuation of the former employer's obligations to the new employer:

> 1) [T]he existence of a substantial continuation in the same business activity; (2) the utilization of the same operating plant; (3) the employment of the same or substantially the same labor force; (4) to maintain the same supervisory personnel; (5) to use the same equipment and machinery and to employ the same methods of production; (6) the production of the same products and the rendering of the same services; (7) continuity of identity; and (8) the operation of the business during the transfer period.

L.R.B. v. Cooperativa Azucarera, 98 P.R.R. at 317-318. ([Footnotes] omitted.)

Appendix A

In *Bruno López,* at 122 [34 P.R. Offic. Trans. at __], we again considered the federal caselaw and stated that in order to determine the existence of successor liability, several factors must be weighed, among which are:

> (1) [W]hether the new employer had notice of the employee's claim against his or her predecessor; (2) the relative capacity of each employer to provide adequate relief to the employee's claim, if valid, and (3) the benefit each employer has derived or may derive from the acts charged against them.

These three factors, like those set forth in *Cooperativa Azucarera,* must be weighed when passing on cases that involve a possible successor liability issue, but none of these factors is controlling by itself. In *Piñeiro,* for instance, there was no evidence that the successor employer had notice of the employees' claims, but we nevertheless imposed liability "to strike a fair balance between the interests involved," considering "the clear continuity of identity between both companies, the similarity in business operations, as well as the public policy of protecting the workers in wrongful discharge cases, especially when in these cases the employees would otherwise be unable to obtain relief." *Piñeiro v. Int'l Air Serv. of P.R., Inc.,* 140 D.P.R. at 353 [40 P.R. Offic. Trans. at J. As we can see, what must be determined is whether in light of the specific facts of a case, there is a concurrence of a sufficient number of the factors considered important in previous cases for recognizing the existence of successor liability.

B. As we have previously stated, in this case, the Court of First Instance deemed proven that plaintiff had been discriminated against because of her age and that she was discharged without just cause. It also found that Urban was liable for said discriminatory discharge under our *successor employer doctrine*. The Court of Appeals, in turn, reversed the trial court's decision and concluded that none of the tests generally required for applying the *successor liability* doctrine, as developed in the United States common law system, was present here.

Although the appellate court acknowledged that the doctrine was subject to state law and varied from state to state, it completely ignored the above-cited cases in which this Court has discussed in detail the *successor employer doctrine* as it has been applied in our jurisdiction. The Court of Appeals examined four factors that have been considered by the federal courts as exceptions to the general rule that when a company sells its assets to another, the purchaser is not liable for the seller's obligations.[5] However, it overlooked the previously cited factors stressed by this Court in *Cooperativa Azucarera* and in *Bruno López* to establish that the successor employer is liable to the employees for the predecessor's obligations.

We are not insinuating here that it is improper for our courts to assess the factors considered in United States

5. (1) The purchaser (new employer) expressly or implicitly agrees to assume liability; (2) the transaction is a consolidation or merger; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability. 15 Fletcher Cyc. Corp. § 7122, at 249 (Perm. ed. 1999).

common law to determine the existence of "successor liability" where pertinent. But our courts cannot ignore completely—as they did here—our own precedents on a doctrine adopted in our jurisdiction since the 1960's.

In turn, when the Court of First Instance found that Urban was a successor employer and, as such, was liable to plaintiff, it made an effort to apply the tests laid down in *Cooperativa Azucarera* and ruled that "[n]or all practical purposes, Tienda Marianne ... is still in the same place, with the same employees, engaged in the same type of business activity, and with the same business identity."[6] [(Emphasis suppressed.)]

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6. The Court of First Instance specifically arrived at the following conclusions of fact:

> "(1) [T]he *Tiendas Marianne* store at the Centro del Sur Shopping Center, where Urban was summoned, was and still is the same store it has kept; (2) it was in that store that plaintiff worked for many years for Tiendas Marianne; (3) Urban currently keeps that same store with the same name, with the same concept (selling women's clothes), and at the exact same place and physical space in the shopping center; (4) neither in that same store nor in the other Tiendas Marianne stores throughout Puerto Rico has Urban changed the type of business activity in which it is engaged (the sale of women's clothes), which is the same as when plaintiff worked for Tiendas Marianne under the former owner; (5) Urban has kept the same store design as the former owner; (6) it uses the same cash register; (7) Urban keeps essentially the same personnel; (8) Urban keeps its bank

(Cont'd)

Appendix A

Although the Court of Appeals determined that it was not proper to impose liability on respondent here based on the factors associated with the common-law *successor liability* doctrine, it also ascribed great importance to Urban's contention that the sale of assets in a bankruptcy proceeding barred the application of the *successor employer* doctrine. A well-pondered analysis of the subject shows that the appellate court erred in including in its judgment a limited analysis of the relevant federal caselaw.

Indeed, there is a string of cases in which the courts have held that the sale of assets approved by a federal bankruptcy court as "free and clear of all claims" precludes the application of the *successor liability* doctrine against the asset purchaser. *In re All American of Ashburn, Inc.*, 56 B.R. 186 [(Bkrtcy. N.D. Ga. 1986)]; *Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.)*, 19 B.R. 323 [(Bkrtcy. W.D. Wash. 1982)]; *Forde v. Kee-Lox Mfg. Co., Inc.*, 437 F. Supp. 631 [W.D. N.Y. (1977)]. Some bankruptcy courts have attempted to enjoin claims that would interfere not only with the sale of assets, but also with the enjoyment of its benefits. *Collier Bankruptcy Manual* ¶ 363.02 [3], at 363-10 ([rev.] 3d ed. 2002).

(Cont'd)

> account in the same bank as the former owner; (9) Urban keeps the same floor design and space distribution in the store, the same colors, logo and sign as the former owner when plaintiff worked for it."

Appendix to the Petition for Certiorari at 40-41. (Emphasis suppressed.)

However, another string of weightier federal cases has questioned the bankruptcy courts' authority to override the application of the successor liability doctrines developed by state courts. *Collier, supra.* Thus, the United States Circuit Court of Appeals for the First Circuit has found that inadequate notice to a claimant about the existence of a bankruptcy proceeding may preclude the bankruptcy court from granting injunctive relief against future claims. *In re Savage Industries, Inc.,* 43 F.3d 714 (1st Cir. 1994). The Seventh Circuit Court of Appeals has gone even further, suggesting that bankruptcy courts lack jurisdiction to interfere with successor liability claims. *Zerand-Bernal Group, Inc. v. Cox,* 23 F.3d 159 (7th Cir. 1994). It bears mentioning that the caselaw on which the appellate court's judgment rests comes from bankruptcy court and federal first-instance court cases, whereas the other string of federal cases mentioned here involves decisions from different federal appellate courts.

In general terms, the cases in which the federal courts have held that the sale of assets "free and clear of all claims" approved by a bankruptcy court precludes the application of the successor liability doctrine have set forth two main reasons for arriving at such results: (1) that if after a bankruptcy sale a plaintiff asserts a successor liability claim, he or she would receive a priority over those claims that would be paid in accordance with the Federal Bankruptcy Code, and this would rearrange the priority scheme established by said code; and (2) that the implementation of the successor liability doctrine would have a negative impact on the trustee's ability to sell assets of the estate at a fair price. *In re All American of Ashburn, Inc.,* 56 B.R. 186

(Bkrtcy. N.C. Ga. 1986); *Rubinstein v. Alaska Pacific (In re New England Fish Co.),* 19 B.R. 323 (Bankr.W.D. Wash. 1982); *Forde v. Kee-Lox Mfg. Co., Inc.,* 437 F. Supp. 631 (W.D.N.Y. 1977). In rejecting these arguments, the Seventh Circuit, in the voice of Chief Judge Posner, explained:

> All this is true, but proves too much. It implies, what no one believes, *In re American Hardwoods, Inc.*, 885 F.2d 621 (9th Cir. 1989), that by virtue of the arising-under jurisdiction a bankruptcy court enjoys a blanket power to enjoin all future lawsuits against a buyer at a bankruptcy sale in order to maximize the sale price: more, that the court could in effect immunize such buyers from all state and federal laws that might reduce the value of the assets bought from the bankrupt; in effect, that it could discharge the debts of nondebtors ... as well as of debtors even if the creditors did not consent; that it could allow the parties to bankruptcy sales to extinguish the rights of third parties ... without notice to them or (as notice might well be infeasible) any consideration of their interests. If the [bankruptcy] court could do all these nice things the result would indeed be to make the property of bankrupts more valuable than other property—more valuable to the creditors, of course, but also to the debtor's shareholders and managers to the extent that the strategic position of the debtor in possession in a reorganization enables the debtor's owners and managers to benefit from bankruptcy. But the result would not only be harm to third parties ...

> but also a further incentive to enter bankruptcy for reasons that have nothing to do with the purposes of bankruptcy law.

Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994).

The caselaw trend that refuses to acknowledge a limitation in the application of different successor liability doctrines simply because the sale of assets took place in the context of a bankruptcy proceeding is not only in tune with "important labor-related public policies that conform to our economic, social, and cultural reality," *Piñeiro v. Int'l Air Serv. of P.R., Inc.*, 140 D.P.R. at 349 [40 P.R. Offic. Trans. at __], but is also better supported by federal caselaw and by the doctrine in the field of bankruptcy. Thus, a well-known authority on this matter points out: "Successor liability is a nonbankruptcy state law issue, and bankruptcy should not change the result that would otherwise obtain under nonbankruptcy law." *Collier Bankruptcy Manual, supra,* at 363-11. See also M. H. Reed, *Successor Liability and Bankruptcy Sales,* LI-3 Bus. Law 653 (1996).

We therefore hold that *the sale of assets under a federal bankruptcy proceeding, though free of liens, will not bar the application of the successor employer doctrine as developed by our caselaw precedents.*

C. We have repeatedly held that, as a rule, absent passion, prejudice, bias or manifest error, appellate courts must not disturb the trial courts' weighing of the evidence. *Torres Ortiz v. Plá,* 123 D.P.R. 637 [23 P.R. Offic. Trans.

560] (1989); *Valencia, ex parte,* 116 D.P.R. 909 [16 P.R. Offic. Trans. 1118] (1986); *Velázquez v. Ponce Asphalt,* 113 D.P.R. 39 [13 P.R. Offic. Trans. 53] (1982). We are in no position to question the Court of First Instance's findings that plaintiff was discriminated against by reason of her age and that she was discharged without just cause, but it is indeed incumbent upon this Court to examine whether this case may be appropriately decided by way of the *successor employer doctrine* as set forth in our caselaw.

After applying to this case the tests laid down in *Cooperativa Azucarera* and reaffirmed in *Piñeiro,* the trial court concluded, among other things, that *"Tienda Marianne* . . . is still in the same place, with the same employees, engaged in the same type of business activity, and with the same business identity" it had when plaintiff was discharged, and held Urban liable for the obligations contracted by Petrie. Appendix to the Petition for Certiorari at 41. (Emphasis suppressed.)

The fact that apparently Urban had no knowledge or notice of plaintiff's action against Petrie when it acquired the assets of Tiendas Marianne weighs against the imposition of liability under the *successor employer doctrine.* In fact, the claim had not been filed when the transaction was made. However, we have already indicated that none of the factors to be considered when determining the existence of successor employer liability is controlling by itself. In the last case in which we discussed the successorship doctrine, we imposed liability even though there was no evidence that the purchaser of the company had prior notice of the employees' claims. *Piñeiro v. Int'l Air Serv. of P.R., Inc.*, 140 D.P.R. 343 [40 P.R. Offic. Trans. __] (1996).

Appendix A

An examination of the record of the instant case shows that *plaintiff had no knowledge of the transfer of* the *Tiendas Marianne assets to Urban* until that corporation appeared before the trial court to question the attachment of assets and the execution of judgment. It is clear that plaintiff was not given an opportunity to assert her claim against Petrie during the bankruptcy proceedings. Moreover, everything tends to show that *the employer's corporate structure* was unknown to plaintiff. The copies of the income withholding statements issued by the Department of the Treasury and provided by plaintiff show that different artificial persons had paid her during the years she worked for Marianne, thus making it difficult for the aggrieved worker to determine who was actually her employer.

Therefore, "to strike a fair balance between the interests involved," and considering "the clear continuity of identity between both companies, the similarity in business operations, as well as the public policy of protecting the workers in wrongful discharge cases," and the fact—highly relevant in these cases—that the employee "would otherwise be unable to obtain relief" (*Piñeiro v. Int'l Air Serv. of P.R., Inc.*, 140 D.P.R. at 353 [40 P.R. Offic. Trans. at __]), we hold that *the Court of First Instance acted correctly by imposing liability on respondent Urban as Petrie's successor employer.*

III

Finally, let us consider respondent Urban's contentions that: (1) the service of summons was insufficient because the summons was addressed to Petrie, plaintiff's former

employer; and (2) even if the summons had been correctly served, the judgment was not duly notified and, therefore, it was not final and unappealable and its execution did not lie.

From the outset, we must point out that although respondent Urban has indicated that it appeared before the Court of First Instance without submitting to its jurisdiction to question the service of summons and notice of judgment, it is clear that in its oral and written appearances it presented arguments on the merits as to the sufficiency of the evidence presented by plaintiff.[7] Therefore, we believe that respondent Urban tacitly submitted to the jurisdiction of the trial court and waived its contention of insufficient service of process. See: *Vázquez v. López,* 2003 TSPR 173, 160 D.P.R. __ [60 P.R. Offic. Trans. __] (2003); and *Qume Caribe, Inc. v. Srio. de Hacienda,* 153 D.P.R. 700 [53 P.R. Offic. Trans. __] (2001). In view of this situation, we need not determine whether the imposition of successor liability to a business concern that replaces another through the purchase of the latter's assets implies that the issuance of summons in the name of the predecessor employer suffices to acquire jurisdiction over its successor.

Lastly, Urban contends that it was not duly notified of the trial court's judgment because the address to which it was sent *(150 Meadowlands Parkway, [Secaucus], NJ 07094)* was not its address. However, if this is the case, we cannot understand why Urban does not rebut plaintiff's argument that the documents on record regarding the attached

7. These arguments were copied and developed by Urban in its brief to this Court.

Scotiabank account (which respondent claims as its own), registered in the name of Marianne USPR, Inc., DBA Marianne/Marianne Plus, show that the account holder's address is Urban Brands, Inc., Marianne Division, *150 Meadowlands Parkway, Secaucus, NJ 07094.* In view of this fact, we must conclude not only that respondent Urban was notified of the judgment against Petrie—for which it must answer under the *successor employer doctrine,* as previously discussed—but also that its allegation to the contrary is meritless.

Consequently, the judgment rendered by *the Court of Appeals* on *June 4, 2004, is reversed, and the orders of attachment and execution of judgment issued by the Court of First Instance are affirmed.*

Judgment will be rendered accordingly.

Justice Rivera Pérez dissents without a written opinion.

APPENDIX B — JUDGMENT OF THE COMMONWEALTH OF PUERTO RICO, COURT OF APPEALS, JUDICIAL REGION OF PONCE DATED JUNE 4, 2004

COMMONWEALTH OF PUERTO RICO
COURT OF APPEALS
JUDICIAL REGION OF PONCE

KLCE400366

EVELYN QUIÑONES *[sic]* OQUENDO

Plaintiff-Respondent

v.

PIETRI *[sic]* RETAIL INC., D.I.P., AND/OR CENTRO APPAREL CORPORATION, D/B/A MARIANNE,

Defendants

URBAN BRANDS, INC.

Petitioner

Certiorari from the Court of First Instance,
Ponce Superior Court

Re: Wrongful Discharge

Civil Case No.
JPE 1999-0647 (605)

Panel composed of Judge Brau Ramírez, as Presiding Judge, and Judges Hernández Torres and Martínez Torres.

Judgment rendered by Judge Martínez Torres.

Appendix B

JUDGMENT

San Juan, Puerto Rico, June 4, 2004

Petitioner Urban Brands, Inc. prays this Court to issue the writ of certiorari and to reverse the resolution of the Court of First Instance, Ponce Part, which denied Urban's motion for an order to stay an allegedly unlawful attachment. On the grounds set forth below, we reverse the resolution appealed from.

I

On September 29, 1999, plaintiff-respondent Evelyn Rodríguez Oquendo filed a labor claim against Petrie Retail Inc., D.I.P., and/or Centro Apparel Corporation, d/b/a Marianne (Petrie). In her complaint, Rodríguez Oquendo alleged that she was discharged without just cause and that she was the victim of discrimination by reason of age.

Summons was issued in the name of Petrie. On October 15, 1999, the summons and the complaint were delivered to Maritza Ruiz Vélez, manager of the Tiendas Marianne store located at the Centro del Sur Shopping Center in Ponce.

Ruiz Vélez, manager of the Tiendas Marianne store at Centro del Sur Shopping Center, immediately called the main offices of Tiendas Marianne and sent them both documents.

However, petitioner Urban had acquired the assets of Tiendas Marianne de Puerto Rico ten (10) months before the service of summons against respondent Petrie and two

(2) months after plaintiff-respondent Rodríguez Oquendo was discharged. Urban acquired the assets at a sale carried out in the United States Bankruptcy Court, Southern District of New York, inasmuch as Petrie had filed for bankruptcy under Chapter 11 of the Federal Bankruptcy Code in the State of New York.

On May 25, 2000, on motion of plaintiff-respondent Rodríguez Oquendo, default was entered against Petrie.

The trial was held, and the Court of First Instance rendered Judgment for plaintiff and ordered defendant Petrie to pay Rodríguez Oquendo $11,204.67 as penalty for the alleged wrongful discharge, plus $30,000 for the alleged age discrimination. A copy of the notice of judgment was filed in the record of the case on June 7, 2001.

On March 13, 2002, plaintiff-respondent Rodríguez Oquendo moved the Court of First Instance for execution of judgment and, on September 16, 2002, the court finally issued the order of execution of judgment, ordering the attachment of two (2) bank accounts belonging to petitioner Urban. One of the accounts is from Scotiabank de Puerto Rico and the other from Banco Popular de Puerto Rico. The court issued the writ of execution on October 4, 2002. The funds deposited in the Banco Popular account were not attached because the account number in the attachment order was incorrect.

Petitioner Urban appeared in the Court of First Instance without submitting to its jurisdiction and asked the court to set aside the attachment and to stay the execution of judgment. In its motion, Urban adduced that the attached

account belonged to it, and alleged insufficiency of process and that it was not a party to the claim. Urban also asked to be heard.

After the hearing, the Court of First Instance denied petitioner Urban's motion. Aggrieved, Urban sought certiorari before this Court, assigning four errors to the Court of First Instance. Urban contends that said court erred: first, in determining that Urban was indeed summoned; second, in determining that Urban was a successor employer; third, in not issuing an order to stay the allegedly wrongful and illegal attachment; and, finally, in granting authorization to withdraw the funds attached in execution of judgment before the resolution became final and unappealable.

In aid of our jurisdiction, we set aside the March 10, 2004, order of the Court of First Instance, Ponce Part (which authorized the withdrawal of the attached funds) and banned the issuance of similar orders. We also ordered that any funds withdrawn in compliance with that order be deposited again in the Court of First Instance, Ponce Part.

The Court also ordered plaintiff-respondent Rodríguez Oquendo to file an opposition to the petition, which she timely did.

Having examined the record and the parties' briefs, we decide under the applicable law.

Appendix B

II

Under section 363(f) of the Federal Bankruptcy Code, 11 U.S.C. § 363(f), the trustee may sell property free of interests.[1] If the debtor's assets have been liquidated, the claimants will probably seek to recover from the purchaser or purchasers of the assets. Courts have provided protection to purchasers of assets, who would otherwise be subject to these claims under the successor liability doctrine, by way of the approval of sales free of all present and future claims against the debtor ~~or the estate~~.[2]

As a general rule, a purchaser of assets does not assume the, liabilities of the seller unless the purchaser expressly agrees to do so or an exception to the rule exists. Successor liability is an equitable exception to this rule. Successor liability is subject to state law, and the doctrines vary from state to state, but generally successor liability will not attach unless (1) the purchaser expressly or impliedly assumes the liability; (2) the transaction constitutes a merger or consolidation of the businesses; (3) the purchaser is merely

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1. "Under section 363 (f), the trustee may sell property free of interests." 3 *Collier on Bankruptcy* ¶ 363.02[3], at 363-15 *[sic]*.

2. "If the debtor's assets have been liquidated, such claimants may seek to recover from [a purchaser of the debtor's assets. Courts have sought to provide protection to] purchasers of assets, who might otherwise be subject to such claims under principles of successor liability, by approving sales free of all present future claims against the debtor or the estate." *Id.* at 363-16 *[sic]*.

a continuation of the seller; or (4) the transaction was carried out fraudulently to avoid liability.[3]

To determine whether the purchaser is a continuation of the seller, we must examine if there is a continuation of the seller's corporate entity, not if there is a continuation of the seller's business operations.[4] 15 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 7122.60 *[sic]*, at 257, West Group (1999). See *Cooper v. Lakewood Eng'g & Mfg. Co.*, 45 F.3d 243, 245 (8th Cir. 1995); *Upholsterers Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1325-1326 (7th Cir. 1990).

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3. "As a general rule, a purchaser of assets does not assume the liabilities of the seller unless the purchaser expressly agrees to do so or an exception to the rule exists. Successor liability is an equitable exception to this general rule. Successor liability depends on state law and the doctrines vary from state to state, but generally successor liability will not attach unless (1) the purchaser expressly or impliedly assumed the liability; (2) the transaction amounted to a merger or consolidation of the businesses; (3) the purchaser was merely a continuation of the seller; or (4) the transaction was entered into fraudulently in order to avoid liability for the obligations." *Id.* at 363-16 *[sic]*.

4. "The mere continuation exception to the nonliability of successors applies when the transferee corporation is merely a continuation or reincarnation of the transferor corporation. In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity . . . not whether there is a continuation of the transferor's business operations." 15 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 7122.60 *[sic]*, at 257, West Group (1999).

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The successor liability doctrine may be applied to claims for discrimination in employment filed under the Civil Rights Act of 1866 (42 U.S.C. § 1981). Although successor liability may be imposed in a particular case under § 1981, it all depends on whether the successor knew about the charge or pending lawsuit before acquiring the business or assets of its predecessor. The successor liability doctrine may also be applied to claims for discrimination in employment filed under Title VII of the Civil Rights Act of 1964. This doctrine is also applicable to actions filed under state civil rights acts. Successor liability in causes of action brought under state civil rights acts is defeated if the successor corporation had no knowledge of the discrimination claim before the date of purchase. What is more, the doctrine may apply to claims brought under the Age Discrimination in Employment Act (A.D.E.A.).[5] *Id.* at 257-258 *[sic]*.

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5. "The successor doctrine may apply to claims for employment discrimination brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981. Whether successor liability should be imposed in a particular case brought under § 1981 depends upon whether the successor company had notice of the charge or pending lawsuit prior to acquiring the business or assets of the predecessor. . . . [T]he successor liability doctrine may also be applied to claims for employment discrimination brought under Title VII of the Civil Rights Act of 1964. The successor liability doctrine is also applicable to actions brought under state civil rights acts. Successor liability in a cause of action brought pursuant to a state civil rights act is foreclosed where the successor corporation had no notice of the discrimination claim prior to the acquisition date. Furthermore, the successor doctrine may apply to claims for employment discrimination pursuant to the Age Discrimination in Employment Act." *Id.* at 257-258 *[sic]*.

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In *Nathanson v. Labor Board*, 344 U.S. 25, 29 (1952), the United States Supreme Court held that the purpose of the Bankruptcy Act was to achieve equality of distribution among the claimants.[6] That is why bankruptcy courts have held that a sale of the debtor's assets, approved by the United States Bankruptcy Court as free and clear of all claims, precludes the application of the successor doctrine against a purchaser of those assets in a suit based on the debtor's alleged employment discrimination and violations of employees' civil rights. See *In re All American of Ashburn, Inc.*, 56 B.R. 186, 190 (Bkrtcy. N.D. Ga. 1986); *Rubinstein v. Alaska Pacific Consortium [(In re New England Fish Co.)]*, 19 B.R. 323, 328-329 (Bkrtcy. W.D. Wash. 1982); *Forde v. Kee-Lox Mfg. Co., Inc.*, 437 F. Supp. 631 (W.D.N.Y. 1977).

In *In re All American of Ashburn, Inc.*, the United States Bankruptcy Court in Atlanta explained that *Forde*, 437 F.Supp. at 633-634, established two policies against allowing successor liability to apply to purchasers of assets in bankruptcy sales. The first is that if a plaintiff files a claim grounded on successor liability after a bankruptcy sale, he or she, in effect, would receive a priority over those claims that would be paid in accordance with the Federal Bankruptcy Code. As a result, the successor liability theory would modify the priority scheme established by the Federal Bankruptcy Code. The other reason is the negative impact that the successor liability doctrine would have on the trustee's ability to sell assets of the estate at a fair price.[7]

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6. The theme of the Bankruptcy Act is 'equality of distribution.'" *Nathanson v. Labor Board*, 344 U.S. 25, 29 (1952).

7. "The Forde case sets out two policies against allowing successor liability to follow bankruptcy sales. The first is that if a (Cont'd)

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This case does not satisfy the successor liability tests. Petitioner Urban, as the purchaser, did not assume—expressly or impliedly—defendant Petrie's alleged liability to plaintiff-respondent Rodríguez Oquendo. Section 2.3 of the Asset Purchase Agreement clearly shows that Urban only assumed the following liabilities: (a) all liabilities for on-order merchandise; (b) all liabilities of any of the sellers accruing or arising from and after the closing date under any and all assigned contracts. The agreement further provides that all the liabilities and obligations of the seller of whatever kind or nature, known or unknown, fixed or contingent, accrued or unaccrued, other than the liabilities assumed by the purchaser, are considered excluded liabilities, and the purchaser will not assume or pay, perform, discharge or be responsible for any of the excluded liabilities. See Exhibit XXII, at 79-80. Second, there is no such thing here as a merger or consolidation of two businesses. Third, Urban is a corporation different from Petrie; it is not a continuation of Petrie's same corporate entity. Finally, there is no assignment of fraud in the acquisition of the assets.

Nevertheless, even if the successor liability tests had been met, plaintiff-respondent Rodríguez Oquendo did not prove that petitioner Urban had knowledge or notice of the

(Cont'd)

plaintiff asserts a claim grounded on successor liability after a bankruptcy sale, he, in effect, receives a priority over those claims which were paid in accordance with the Bankruptcy Code . . . The result is that successor rearrange the priority scheme established by the Bankruptcy Code. . . . The other reason is the negative impact that potential successor liability claims would have on the trustee's ability to sell assets of the estate at a fair price." *All American of Ashburn, Inc.*, 56 B.R. 186, 190 (Bkrtcy. N.D. Ga. 1986).

alleged employment discrimination claim at the time of acquiring defendant Petrie's assets. This forecloses or defeats Rodríguez Oquendo's cause of action for employment discrimination against Urban under the successor liability doctrine.

Therefore, the Court of First Instance erred in holding that petitioner Urban was liable to plaintiff-respondent Rodríguez Oquendo under the successor liability doctrine for her allegedly discriminatory discharge by respondent Petrie.

III

Urban's defenses were not waived, because it was never appropriately summoned or joined as a party to the claim. Service of process is a constitutional procedural mechanism whereby the court acquires jurisdiction over the defendant's person, so that he or she may appear to be heard and to defend himself or herself from the claim filed against him or her. Civil Procedure Rule 4 (32 L.P.R.A. App. III); *Peguero y otros v. Hernández Pellot*, 139 D.P.R. 487, 494 (1995). (Cases cited.)

"'The main purpose of service of process is to notify the defendant that an action has been filed against him or her, in order to guarantee his or her right to be heard and to defend himself or herself." *Márquez v. Barreto*, 143 D.P.R. 137, 142 (1997). See also *Bco. Central Corp. v. Capit[o]l Plaza, Inc.*, 135 D.P.R. 760, 763 (199[4]). Since service of process is a constitutional imperative of due process of law, we have demanded strict compliance when its requirements are

involved. *Quiñones Román v. Cía. ABC*, opinion of October 31, 2000, 2000 J.T.S. 172, at 295; *First Bank of P.R. v. Inmob. Nac., Inc.*, 144 D.P.R. 901, 913 (1998). If these requirements are not met, the court does not acquire jurisdiction over the defendant's person.

The concept of "*in personam* jurisdiction" is inextricably tied to the due process of law. *Márquez v. Barreto, supra*, at 142 [-143]; *Reyes v. Oriental Fed. Savs. Bank*, 133 D.P.R. 15, 21 (1993). A court may acquire *in personam* jurisdiction in two manners: (1) by adequately using the procedural mechanisms of service of process provided in the Rules of Civil Procedure, or (2) by the defendant's voluntary submission to the jurisdiction of the court. *Márquez v. Barreto, supra*, at 143.

Moreover, for a plaintiff to acquire jurisdiction over the person of a defendant, due process of law requires that the defendant be adequately notified of the claim filed against him or her, and that he or she be afforded the opportunity to be heard before his or her rights are adjudicated. *León v. Rest. El Tropical*, opinion of June 7, 2001, 2001 J.T.S. 84, at 1326; *Ind. Siderúrgica v. Thyssen Steel Caribbean*, 114 D.P.R. 548, 559 (1983).

Section 12.01 of Act No. 144 of August 10, 1995, better known as the General Corporations Law of 1995 (14 L.P.R.A. § 3126), provides the following with regard to service of process on corporations doing business in Puerto Rico:

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§ 3126. Service of process on corporations

(a) Service of legal process upon any corporation organized in the Commonwealth shall be made by personally delivering a copy of the process to any officer or director of the corporation in the Commonwealth, or the registered agent of the corporation in the Commonwealth, or by leaving it at the dwelling or usual place of abode of any officer, director or registered agent (if the registered agent is an individual) in the Commonwealth, or at the registered office or other place of business of the corporation in the Commonwealth. If the resident agent is a corporation, service of process may be made through such corporation as agent, by delivery in the Commonwealth of a copy of the process to the president, vice president, secretary, assistant secretary or any director of the corporate resident agent, . . .

Civil Procedure Rule 4.4(e) (32 L.P.R.A. App. III, R. 4.4 (e)) also provides the following with respect to service of process on corporations:

Rule 4.4. Personal service

The summons and complaint shall be served together. The plaintiff shall furnish the persons making service with the necessary copies. The process server, upon delivering copy of the summons, shall make proof of service on the back

> of the same, writing above his signature the date and place of the service and the name of the person upon whom service was made. Service shall be made as follows:
>
> . . . .
>
> (e) Upon a corporation, company, partnership, association or any other artificial person, by delivering a copy of the summons and of the complaint to an officer, managing or general agent, or to any other agent authorized by appointment or designated by law to receive service of process.

The above-stated rule shows that process may be served on a corporation by delivering a copy of the summons and of the complaint to an officer, managing or general agent or any other agent authorized by appointment or designated by law to receive service of process. *Quiñones Róman v. Cía. ABC*, *supra*, at 295. What is truly important for a person to qualify as managing agent through whom a corporation authorized to do business in Puerto Rico may be summoned is that said person be in a position of sufficient responsibility so that it may be reasonable to presume that the person will transmit or forward the summons and the complaint to his or her organizational superiors. *Id.* See 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1103, West Pub. (1987).

Regarding the term "managing agent," *Quiñones Róman* cites corporate commentator Fletcher to point out that state and federal courts are inclined to construe said term liberally

in order to facilitate the acquisition of jurisdiction over a corporation. See 18A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 8746, at 97, West Pub. (1997).

To ensure compliance with the notification requirement, the summons must be served on a natural or artificial person who, as an officer, managing or general agent, or agent authorized or designated by law to receive service of process can, with reasonable certainty, receive and remit the summons to the defendant corporation. Civil Procedure Rule 4.4 (e); *[Léon] v. Rest. El Tropical*, opinion of June 7, 2001, 2001 J.T.S. 84, at 1326-1327. (Cases cited.)

In sum, the rule reiterated by Puerto Rico's highest court is that the defendant must be "[r]eally notified of the claim against him or her and that his or her essential rights are not substantially harmed." *[Léon] v. Rest. El Tropical, supra.*

In this case, petitioner Urban did not submit voluntarily to the jurisdiction of the court, The summons was addressed to Petrie, not to Urban. The complaint makes no reference to the fact that Petrie had sold its assets in Puerto Rico to Urban. Although process was served on the person of a managing agent, the manager was authorized to receive summonses on behalf of Urban not summonses addressed to Petrie. Neither was it alleged in the complaint that Urban had assumed Petrie's liabilities or obligations. What is more, Urban is not even a party to the action.

Therefore, the Court of First Instance erred in finding that petitioner Urban had been adequately summoned.

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IV

For the foregoing reasons, the writ of certiorari is issued, the judgment below is reversed, and the attachment order is set aside. Therefore, it is ordered that the funds attached be returned to petitioner Urban Brands, Inc.

It was so agreed and ordered by the Court and certified by the Chief Clerk.

(Illegible signature)
Aida Ileana Oquendo Graulau
Chief Clerk
[Handwritten:] Deputy Clerk

APPENDIX C — RESOLUTION OF THE COMMONWEALTH OF PUERTO RICO, COURT OF FIRST INSTANCE, SUPERIOR COURT OF PONCE DATED JANUARY 16, 2004

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE

CIVIL NO. **JPE1999-0647 (605)**

EVELYN QUIÑONES *[sic]* OQUENDO

Plaintiff

v.

[PIETRIE] RETAIL INC., D.I.P., AND/OR CENTRO APPAREL CORPORATION, D/B/A MARIANNE

Employer-defendant

RE: ACTION FOR WRONGFUL DISCHARGE AND DISCRIMINATION IN EMPLOYMENT

RESOLUTION

I

Plaintiff Evelyn Rodríguez Oquendo was employed by *Tiendas Marianne*[7] *[sic]* from **April 14, 1980**, to **October 5**,

7. At the time, Tiendas Marianne de Puerto Rico was owned by Petrie Retail, Inc., although the payment stubs and withholding (Cont'd)

1998, when she was discharged. At the time of her discharge, Rodríguez Oquendo was Assistant Manager of the Marianne store that was—and still is—located at the Centro del Sur Shopping Center in Ponce.

On **September 29, 1999**, Rodríguez Oquendo filed a labor claim against her employer, *Tiendas Marianne*, alleging that she had been discharged from her employment without just cause and that she had been discriminated against because of her age.

On **October 5, 1999**, the Clerk's Office of this Judicial Center issued the pertinent notice of the complaint filed against the defendant employer, who was duly notified and summoned on that same day at 1:30 p.m.

According to the service of summons or notice of the complaint, to the oral and documentary evidence admitted during the proceedings, and to *Urban Brands, Inc.*'s admission and stipulation, the person served with summons on that date was **Maritza I. Ruiz Vélez**, who was and still is the Manager of the Tiendas Marianne store located at the Centro del Sur Shopping Center in Ponce; this was the same store branch owned by the defendant employer and where plaintiff Rodríguez Oquendo worked for many years.

According to *Ruiz Vélez's* testimony before this Court, as soon as she received the complaint and the summons, she

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(Cont'd)

statements admitted in evidence show that [plaintiff] received her salary from other corporations that apparently were subsidiaries to that company.

immediately called the Tiendas Marianne main offices in San Juan and forwarded both documents.

The evidence presented by *Urban Brands, Inc.*, shows that by the date the manager of Tiendas Marianne in Centro del Sur was summoned, the corporate cluster that owned Tiendas Marianne in Puerto Rico had been sold almost ten months earlier to a corporation called *Urban Acquisition Corp.*[8] *[sic]*

Despite the summons served on the person of Manager Ruiz Vélez, nobody appeared before this Court to answer or object to the complaint or to report a change of owner; thus, on plaintiff's motion, this Court entered default against the defendant employer on **May 25, 2000**. See 32 L.P.R.A. §§ 3120 and 3121; *Supermercado Grande Inc. v. Álamo Perez, decided September 12, 2002, 2003 TSPR 116*; *Ruiz Rivas v. Colegio San Agustín, decided September 15, 2000, 2000 TSPR 147*; *Valentín v. Housing, 146 D.P.R. 712 (1998)*; *Mercado Cintrón v. Zeta Communications, 135 D.P.R. 737 (1994)*; *and Rules 10.1 and 45 of Civil Procedure*.

After holding the trial on the merits, this Court rendered **Judgment** for plaintiff and ordered the defendant employer to pay plaintiff *Rodríguez Oquendo* **$11,204.67** as penalty for wrongful discharge [Act No. 80 of May 30, 1976] and $30,000 in damages for age discrimination [Act No. 100 of June 30, 1959].

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8. *[sic]* The evidence presented does not show clearly what relationship, if any [other than the similarity in names] existed between the appearing party Urban Brands Inc. and Urban Acquisition Corp.

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The **Judgment** in this case was filed in the record of the case and notified to the parties, according to the amended Notice of Judgment of **June 7, 2001**. As of this date, said **Judgment** is final and unappealable.

On **March 13, 2002**, plaintiff sought execution of the **Judgment** rendered in this case.

On **May 2, 2002**, plaintiff requested a new order of execution of **Judgment**, which was finally issued on **September 16, 2002**. The corresponding writ of execution was issued on **October 4, 2002**.

On **October 21, 2002**, a marshal from this Judicial Center served the order and the writ of execution on the Ponce branch of two banks: *Banco Popular de Puerto Rico* and *Scotiabank*.

The *Banco Popular de Puerto Rico* account that, as informed by plaintiff, was kept by Tiendas Marianne during the time she was employed there, and to which she personally made deposits as part of her duties, could not be attached. Said bank alleged that the account number informed was incomplete.[9] *[sic]*

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9. *[sic]* Plaintiff testified at the hearing that said account number was correct and that it was there that her employer made deposits from the Centro del Sur Shopping Center store. Witness Ivette Gómez Rodríguez, who had of been an executive officer of Tiendas Marianne before the sale of its assets, and who was now Urban's vice president for loss control, testified that said account was opened in December 1998, after the sale of the Marianne stores assets to "*Urban.*"

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At *Scotiabank*, the marshal attached **$16,177.30** deposited in account No. 00402004926385, under the name of the defendant employer, Tiendas Marianne.

As a result of the attachment, on **October 23, 2002**, **Urban Brands, Inc**. **[Urban]** appeared before this Court and, without submitting to its jurisdiction, asked the Court to set aside the attachment order and to stay execution of the **Judgment**.

It must be mentioned that when **Urban** appeared before this Court seeking several remedies, it informed that it would not submit to, or recognize this Court's jurisdiction to grant relief against it. However, it seems to recognize our authority and jurisdiction to grant relief in its favor.

Urban essentially alleges that it is the owner of the attached bank account, because when the manager of the store located at the Centro del Sur Shopping Center [Maritza I. Ruiz Vélez] was summoned, **Urban** had already bought all the assets of *Tiendas Marianne* in Puerto Rico through a contract entitled *Asset Purchase Agreement*, dated December 1, 1998. Urban alleged that it had bought said assets without assuming debts or liabilities of any kind.[10] *[sic]*

Urban further alleged that it had not been summoned as prescribed by Civil Procedure Rule 4 and that the labor claim had been directed against the plaintiff's former employer,

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10. *[sic]* According to the *Asset Purchase Agreement*, it was Urban Acquisition Corp. who purchased Marianne's assets We must assume by such representation that [Urban Acquisition Corp.] and Urban Brands, Inc. are one and the same.

not against it. **Urban** also alleged that it was not a party to this case, and requested a hearing to state its position.[11] *[sic]*

Plaintiff, in turn, when notified of the above-mentioned motion, appeared of record through an *Urgent Motion for Order Directed at Urban.*

In said motion, plaintiff essentially stated that although the Judgment rendered in this case was final and unappealable, and although the manager of the Marianne Store located at Centro del Sur Shopping Center had been personally summoned, it would agree to a stay of the execution of Judgment until the contentions set forth in **Urban's** motion were clarified.

Plaintiff also alleged that if what **Urban** claimed in its motion with regard to the sale of assets was true, Urban, in keeping with the decision in *Berrios v. U.P.R., 116 D.P.R. [88 (1985)]*, had the obligation to promptly resort to the Court instead of doing nothing to clarify what it is now claiming. Plaintiff further alleged that if **Urban's** pleadings prevailed, its acts would harm her. Plaintiff subsequently stated that if **Urban** did not submit to the court's jurisdiction, it would not be entitled to relief.

With the issue thus joined, this Court held several hearings to determine the tenability of setting aside the attachment and the execution of Judgment. Both parties

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11. *[sic]* Urban's position underwent several changes during the hearing; its last position was that the Judgment rendered in this case should be set aside to allow **Urban** to present evidence that plaintiff's discharge was justified.

presented evidence in support of their positions, and **Urban** always made clear that it was not submitting to the jurisdiction of this Court.

Having examined and weighed the testimony given in Court, based on the credibility afforded by the Court to each witness, and with the benefit of the documents presented by the parties, as well as their pleadings, we resolve **Urban's** motion. *Trinidad Garcia v. Chad[e]*, decided January 18, 2000, 2000 TSPR 7; *Aquelio Lopez v. Arquelio Garcia [sic]*, decided August 31, 2001, 2001 TSPR 124.

II

To begin, we must make several remarks.

In the first place, the Judgment rendered in this case is final and unappealable as of today. No motion has been filed against it to release one of the parties, nor has any independent action been brought to set it aside because one of the parties was not summoned for fraud to the Court, as provided by Civil Procedure Rule 49.2; *Banco de Santander v. Fajardo Farms*, 141 D.P.R. [237] (1996); *Rios Moya v. Industrial Optics*, 2001 TSPR 117.

In this case, **Urban** has appeared, without submitting to the jurisdiction of this Court, to have us set aside the order for execution of the Judgment rendered in this case and the attachment of assets registered in the defendant employer's name, and which, as alleged by **Urban**, belong to it.

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In second place, as shown by the certificate of service of summons in this case, by the admission made by Urban's counsel, and by the testimony given by Urban's manager at the Marianne store located in Centro del Sur Shopping Center [Maritza I. Ruiz Vélez], on **October 15, 1999**, said manager was personally served with the complaint or suit and with a copy of the summons or notice of the complaint on behalf of Tiendas Marianne. Therefore, **Urban** was duly notified and summoned through one of its managers. Civil Procedure Rule 4.4 (e); *Román v. Compañía*, decided October 31, 2000, 2000 TSPR 160; *León García v. Restaurante El Tropical*, decided June 7, 2001, 2001 TSPR 81.

According to the testimony given in open court by **Urban**'s manager, Maritza I. Ruiz Rivera, as soon as she received the documents regarding this complaint, she immediately contacted the Tiendas Marianne main offices in the metropolitan area and, as instructed by said office, sent them the documents. *León v. Rest. El Tropical*, *supra*. **Urban** did nothing with these documents.

In third place, it comes forth from the testimony of plaintiff Evelyn Rodríguez Oquendo, of **Urban's** manager, Martiza I. Ruiz Rivera, and of **Urban's** executive officer, Ivette Gómez Rodríguez, that: (1) the *Tiendas Marianne* store at the Centro del Sur Shopping Center, where **Urban** was summoned, was and still is the same store it has kept; (2) it was at that store that plaintiff worked for many years for Tiendas Marianne; (3) **Urban** currently keeps that same store with the same name, with the same concept (selling women's clothes), and exactly at the same place and physical space in the shopping center; (4) neither in that same store nor in the

other Tiendas Marianne stores throughout Puerto Rico has **Urban** changed the type of business activity in which it is engaged (the sale of women's clothes), which is the same as when plaintiff worked for Tiendas Marianne under the former owner; (5) **Urban** has kept the same store design as the former owner; (6) it uses the same cash register; (7) **Urban** keeps essentially the same personnel; (8) **Urban** keeps its bank account in the same bank as the former owner; (9) **Urban** keeps the same floor design and space distribution in the store, the same colors, logo, and sign as the former owner when plaintiff worked for it.

For all practical purposes, *Tienda Marianne in Puerto Rico* is still in the same place, with the same employees, engaged in the same type of business activity, and with the same business identity. In Law, this is known as a successor employer. *[L.R.B.] v. Cooperativa Azucarera*, 98 [P.R.R. 307] (1970); *J.R.T. v. Asoc. Playa Azul*, 117 D.P.R. [20] (1986); *Bruno López v. Motorplan*, 134 D.P.R. 111 (1993); *Pineiro v. Int'l Air Service*, 140 D.P.R. 343 (1996).

III

The Judgment rendered here under Acts Nos. 80 and 100 is protected by the public policy of the Commonwealth of Puerto Rico on labor claims to the point that the claim for compensation Act No. 80 is unwaivable. See 29 L.P.R.A. § 185i.[12] *[sic]*

12. *[sic]* **Urban** alleges that the purchase, free and clear of liens, of Tiendas Marianne's assets in Puerto Rico that took place in the United States Bankruptcy Court relieves it from the effects of the Judgment rendered in this case. It suffices to say that a contract executed outside this jurisdiction cannot contravene the public labor policy of Commonwealth Puerto Rico jurisdiction. On the other hand, what **Urban** really wants is to have the Judgment set just cause for the discharge.

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Urban knew since **October 15, 1999**, that a labor claim had been filed against it as the successor employer of *Tiendas Marianne* in Puerto Rico, but did nothing about it. It did not answer the complaint, did not seek dismissal, and did not ask to intervene in order to clarify any defense it may raise. With its silence and inaction, it allowed the complaint to follow its course. At the hearing, **Urban** did not present evidence that it had notified the previous owner so that the latter would assume its own defense of the case or state whatever it deemed proper at law in defense of its rights.

If **Urban** deemed that the claim against it was not actionable, in the discharge of its obligation to act with due diligence and clarity, it should have appeared of record, as it now does, to allege what it now alleges, or what it deemed was proper at law, thus alerting plaintiff and this Court that there had been a transfer of assets between the former employer and the new employer. Its silence and idleness cannot be rewarded. *Nemo auditur propiam turpitudinem allegans. Berrios v. U.P.R.*, 116 D.P.R. 88 (1985); *Velilla v. Pueblo Supermarkets*, 111 D.P.R. 585 (1981); *Morales v. Municipio de Toa Baja*, 119 D.P.R. 682 (1987); *Municipio de Ponce v. Autoridad de Carreteras*, decided December 20, 2001, 2001 JTS 3; *Rodríguez v. Banco Desarrollo*, decided January 9, 2001, 2001 TSPR 2.

By remaining idle and doing nothing, **Urban** knew or should have known that with its behavior it was admitting the fact that it was a successor employer. This was thus acknowledged by **Urban** by the way it acted in this incident, because its briefs and pleadings in Court show that the true reason for appearing in this case is to have the Judgment set aside so that it may present evidence that plaintiff's discharge was justified. **Urban's** plan is four years too late.

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IV

Urban is what in law is known as a successor employer. *Bruno López v. Motorplan*, *supra*; *Piñe[i]ro v. Int'l Air Services*, *supra*. Therefore, it is liable to plaintiff not only because of this juridical figure, but also because of the breach of its legal obligation to diligently appear in Court. *Berríos v. U.P.R.*, *supra*; *Velilla v. Pueblo Supermarkets*, *supra*.

Since **Urban** has not submitted to the jurisdiction of this Court, it has no right to seek relief, because someone who does not recognize the Court's authority to grant relief cannot, at the same time, seek such relief. Even if **Urban** was entitled to appear before this Court without submitting to our jurisdiction, its contentions are wrong, because as a successor employer, it was, and still is liable to plaintiff under Act No. 80 *(Piñeiro v. Int'l Air Services*, *supra)*, and for the discrimination committed against her *(Bruno López v. Motorplan*, *supra)*.

> In this respect we must also stress that this Court must not tolerate the efforts and stratagems employed by unscrupulous employers to evade the jurisdiction of the courts when evidently such acts are utterly improper. Our main duty is to impart justice and to resist being misled by technicalities.
>
> We think it is high time litigants realized that this Court will do everything in its power to see that cases are decided on their merits instead of on legalistic niceties of pleading and procedure. . . . The courts have long since abandoned the sporting theory of justice. Litigants should do the same. No party has a vested interest in the grammatical and

procedural errors of his adversary. *Serra v. Transportation Authority*, 68 P.R.R. 581, 585 (1948).

Leon Garcia v. Restaurante El Tropical, 2001 TSPR 81.

Based on the aforementioned factual and legal grounds, the *Motion for Order to Stay Wrongful Attachment* filed by **Urban on October 23, 2003**, is hereby denied.

Consequently, the Court authorizes the continuation of the execution of the Judgment rendered in this case against the assets of the successor employer **Urban**.[7] [sic]

In Ponce, Puerto Rico, this 16th day of January 2004.

To be notified.

(Illegible signature)
EDUARDO R. ESTRELLA MORALES
SUPERIOR COURT JUDGE

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7. [sic] After the evidentiary hearing on this issue was held, the court determined that this case strikes the necessary balance between the "unequivocal public policy" that covers workers and employees with respect to the "technicalities game" and the constitutional imperative of due process of law regarding the adequate, provable, and reasonable service of process on a defendant employer. *Lucero Cuevas v. The San Juan Star*, decided May 16, 2003, 2003 TSPR 80.

APPENDIX D — JUDGMENT OF THE COMMONWEALTH OF PUERTO RICO COURT OF FIRST INSTANCE, SUPERIOR COURT OF PONCE DATED MAY 18, 2001

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE

CIVIL NO.: JPE1999-0647

RE:

COMPLAINT FOR WRONGFUL
DISCHARGE AND
DISCRIMINATION IN EMPLOYMENT

EVELYN RODRIGUEZ OQUENDO

PLAINTIFF

V.

PETRIE RETAIL INC., D.I.P. AND/OR CENTRO APPAREL CORPORATION, D/B/A MARIANNE

EMPLOYER-DEFENDANT

JUDGMENT

The default hearing on this case was called and plaintiff appeared represented by counsel. Having heard plaintiff's

testimony and examined the documentary evidence presented and admitted, this Court draws the following:

Conclusions of Fact

Plaintiff *Evelyn Rodríguez Oquendo* was employed by the defendant, for whom she worked for approximately 18 years. During the time she worked for her employer, she was a good and profitable employee.

A work relationship without a fixed term existed between plaintiff and her employer. There was no written contract between the parties.

The oral evidence shows that plaintiff worked as Assistant Manager.

On **October 5, 1998,** the defendant employer discharged Evelyn Rodríguez Oquendo without just cause while she was under the protection of the State Insurance Fund. The employer then replaced her with a younger person, thus discriminating against plaintiff.

Based on the above Conclusions of Fact, this Court reaches the following:

CONCLUSIONS OF LAW

"Every employee in commerce . . . in which he/she works for compensation of any kind, contracted without a fixed term, who is discharged from his/her employment without good cause, shall be entitled to receive from his/her employer,

in addition to the salary he/she may have earned: (a) The salary corresponding to one month, as indemnity, if he/she is discharged within the first five (5) years of service . . . [and] (b) An additional progressive compensation equal to one week for each year of service." 29 L.P.R.A. § 185a.

The statute also provides that the years of service shall be determined on the basis of *all* the preceding periods of work accrued by the employee prior to his/her discharge.

In this case, the employee worked for 18 years for the employer and claimed a compensation of $11,204.67 under Act No. 80 of May 30, 1976.

The evidence presented shows that plaintiff's conduct did not justify her discharge or could not be deemed as just cause for her discharge.

Section 2 of Act No. 80 defines just cause for discharge. Although this provision is not exhaustive and the employer may adopt other reasonable rules and regulations regarding employee conduct for the proper operation of the enterprise, *Srio. del Trabajo v. I.T.T.*, 108 D.P.R. 536 [(1979)], absent such employer rules and regulations, we must adopt the statutory provisions.

In every dismissal claim, there arises a presumption that the discharge was not justified. The defendant employer must rebut this presumption and prove, by a preponderance of the evidence, that the discharge was justified. *Rivera Aguila v. K-Mart de Puerto Rico*, 123 D.P.R. 599 [(1989)]; *Srio. del Trabajo v. I.T.T.*, 108 D.P.R. 536 [(1979)].

Appendix D

In this case, the defendant employer was duly summoned, but did not appear; thus, default was entered against it.

The evidence presented shows that the plaintiff worker did not engage in conduct that may warrant discharge.

It was likewise shown by the evidence presented and believed by this Court that the plaintiff *[sic]* employer not only discharged plaintiff without just cause, but also discriminated against her by replacing her with a younger person. Plaintiff's discharge also occurred while she was receiving treatment from the State Insurance Fund; this was something the employer was not allowed to do.

Based on the above conclusions of fact and of law, the Court renders the following:

JUDGMENT

The Court finds for plaintiff and rules that plaintiff's discharge was wrongful and without just cause. The Court likewise holds that the employer discriminated against plaintiff because of her age.

The employer is ordered to pay plaintiff the sum of ***$11,204.67*** under the provisions of Act No. 80 of May 30, 1976, legal interest from the date of her discharge, October 5, 1998, and 25% of the total compensation under Act No. 80 as attorney's fees for the worker's counsel, plus costs and legal expenses, and *$30,000.00* for having discriminated against plaintiff.

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In Ponce, Puerto Rico, this 18th day of May 2001.

TO BE ENTERED AND NOTIFIED.

(Sgd.) Fernando Montañez Delerme
SUPERIOR COURT JUDGE
(Stamped) Fernando Montañez Delerme
Superior Court Judge

APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 1, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No. 95 B 44528 (AJG)
(Substantively Consolidated)

In re

PETRIE RETAIL, INC., *et al.*,

Debtors.

ORDER PURSUANT TO SECTIONS 105, 363, 365, 503(b), 507 AND 1146 OF THE BANKRUPTCY CODE: (A) AUTHORIZING CERTAIN OF THE DEBTORS TO (i) SELL SUBSTANTIALLY ALL OF THE ASSETS RELATING TO THEIR BUSINESS, AND (ii) ASSUME, ASSIGN AND/OR SELL CERTAIN UNEXPIRED LEASES AND EXECUTORY CONTRACTS RELATING THERETO FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES; (B) APPROVING ASSET PURCHASE AGREEMENT AND OTHER AGREEMENTS RELATED THERETO; (C) AUTHORIZING CERTAIN OF THE DEBTORS TO CONSUMMATE ALL TRANSACTIONS CONTEMPLATED BY SUCH AGREEMENTS: AND (D) GRANTING RELATED RELIEF

Appendix E

Upon the motion (the "Motion") dated November 12, 1998 of the Official Committee of Unsecured Creditors (the "Committee" or "Movant") of the above captioned debtors (collectively, the "Debtors") for, among other things, an order pursuant to Sections 105, 363, 365, 503(b), 507 and 1146 of Title 11 of the United States Code (the "Bankruptcy Code"), as supplemented by Rules 2002, 4001, 6004, 6006, 9007 and 9008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"): (a) approving that certain Asset Purchase Agreement dated as of November 12, 1998[1] between the Sellers and Fashion Bug Acquisition Corp. and its successors and assigns ("Fashion Bug") and authorizing the Debtors to take all steps necessary or appropriate to consummate the Asset Purchase Agreement; (b) authorizing the sale of the Purchased Assets to Fashion Bug free and clear of all liens, claims, interests and encumbrances other than those to which Fashion Bug or such other Successful Bidder has agreed to take subject; (c) authorizing the Debtors to assume and assign the Assigned Contracts to Fashion Bug or to such other Successful Bidder; and (d) granting related relief, all as more fully set forth in the Motion; and upon the affidavit of William R. Fabrizio, Esq., submitted in support of the Motion pursuant to Local Bankruptcy Rule 9077-1(a), the Order to Show Cause, dated November 12, 1998 (the "Scheduling Order"), which scheduled (i) a hearing (the "Bidding Procedures Hearing") to consider approval of the Bidding Procedures and other relief; and (ii) a hearing (the "Sale Hearing," and together with the Bidding Procedures Hearings, the "Hearings") to consider the remainder of the

1. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Asset Purchase Agreement or the Motion.

relief sought by the Motion; and the Scheduling Order having established a bar date of November 23, 1998 as modified on the record of the Bidding Procedures Hearing with respect to certain landlords (the "Cure Objection Deadline"), by which landlords and other non-debtor parties to the Assigned Contracts had to file objections setting forth, among other things, all outstanding defaults and any purported conditions to assignment under the Assigned Contracts, whether monetary or non-monetary, and claims of every kind and character existing as of October 31, 1998 and any objections to the Asset Purchase Agreement or be forever barred from asserting such defaults or purported conditions or claims or pursuing any other claims which may have existed on said date under the Assigned Contracts, and taking any action inconsistent with the Asset Purchase Agreement; and the Bidding Procedures Hearing having been held on November 20, 1998; and the Bidding Procedures Order dated November 20, 1998 having been entered; and upon the Motion and upon the full record of the Hearings; and upon all of the submissions filed herein and all prior proceedings in these cases; and upon the affidavits of service reflecting compliance with the notice requirements contained in the Scheduling Order; and the Sale Hearing having been held before the Court on December 1, 1998; and the Court having found that *Urban Acquisition Corp.*, together with its successors, assigns designees ("Purchaser") has submitted the highest and best offer for the Purchased Assets pursuant to an Asset Purchase Agreement (the "Asset Purchase Agreement"); and after due deliberation and sufficient cause appearing therefor; it is

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HEREBY FOUND AND DETERMINED, that:

a. The Court has jurisdiction to hear and determine the Motion and all related matters pursuant to 28 U.S.C. §§ 1334 and 157 and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York, dated December 10, 1984 (Ward, Acting C.J.). Venue of this proceeding in this district is proper pursuant to 28 U.S.C. § 1409. The Motion and Hearings constitute core proceedings pursuant to 28 U.S.C. § 157 (b) (2) (A), (B), (N) and (0). The statutory predicates for the relief granted hereby are Sections 105, 363, 365, 503, 507 and 1146 of the Bankruptcy Code, as complemented by Bankruptcy Rules 2002, 4001, 6004, 6006, 9007 and 9008.

b. Movant has demonstrated that sufficient cause exists to expedite the Hearings on and determination of the Motion and the related relief requested in connection therewith and that delay will cause the Debtors, their estates and creditors irreparable harm.

c. Proper, timely and sufficient notice of the Motion and the Hearings was provided pursuant to Bankruptcy Rules 2002, 4001, 6004 and 6006 and the Scheduling Order. No other or further notice of the Motion, the Hearings, or the entry of this Order is necessary. A reasonable opportunity to object or to be heard regarding the relief requested in the Motion has been afforded to all interested parties, including, but not limited to, (a) all parties who claim interests in or liens upon the Purchased Assets, (b) all parties to the Assigned Contracts, (c) all governmental taxing authorities who have, or as a result of the sale of the Purchased Assets

may have, claims, contingent or otherwise, against the Debtors, (d) all creditors and parties who have filed notices of appearance in this case; (e) the Pension Benefit Guaranty Corporation and all parties who are or may be bidders for the Purchased Assets.

d. Movant has advanced sound and sufficient business justification, and it is a reasonable exercise of its business judgment, to (i) sell all the Sellers' right, title and interest in and to the Purchased Assets upon the terms and conditions set forth in the Asset Purchase Agreement, (ii) assume and assign to Purchaser the Assigned Contracts and (iii) consummate all transactions contemplated by the Asset Purchase Agreement.

e. The provisions of Sections 363(b), 363(f) and 365 of the Bankruptcy Code have been complied with and are applicable as to the Purchased Assets.

f. Consummation of the Asset Purchase Agreement and the related agreements (collectively, the "Transaction Documents") is in the best interests of the Debtors, their estates, creditors, equity security holders and other parties in interest.

g. All of the transactions contemplated by the Transaction Documents, including the sale of the Purchased Assets, are properly authorized under Sections 105, 363, 365, 503, 507 and 1146 of the Bankruptcy Code.

h. The Asset Purchase Agreement represents the highest or otherwise best offer received for the Purchased Assets

following the conduct of an open and complete sale process reasonably calculated to yield the highest or otherwise best offer for the Purchased Assets.

i. The sale, conveyance and assignment of the Purchased Assets pursuant to the Transaction Documents, except as specified in the Asset Purchase Agreement, shall be free and clear of all liens, claims, encumbrances and interests, including, without limitation, mortgages, security interests, pledges, liens, judgments, demands, encumbrances, or charges of any kind or nature, if any, including, but not limited to, any restriction on the transfer, receipt of income or other exercise of any attributes of ownership (the foregoing collectively referred to as "Liens" herein) and all debts arising in any way in connection with any acts of the Debtors, claims (including but not limited to "claims" as that term is defined in the Bankruptcy Code), obligations, demands, guaranties, interests and matters of any kind and nature, whether arising prior to or subsequent to the commencement of these Chapter 11 cases, and whether imposed by agreement, understanding, law, equity or otherwise (the foregoing collectively referred to as "Claims" herein), with all such Liens, Claims, encumbrances and interests released, terminated and discharged as to the Purchased Assets and holders shall be permanently enjoined from asserting such against the Purchased Assets and the Purchaser and shall look solely to the proceeds of sale.

j. The Debtors and Purchaser are exempt from and excused from complying with any jurisdiction's bulk transfer laws or any laws or regulations requiring notice to any taxing authority of any jurisdiction prior to, or other laws which

might directly or indirectly affect, consummation of the transactions contemplated by the Transaction Documents or the relief requested in the Motion and the provisions of this Order.

k. The Transaction Documents: (i) were proposed, negotiated and entered into in good faith after arms-length bargaining by the parties; and (ii) provide the Debtors with the highest or otherwise best offer received for the Purchased Assets. Purchaser is a good faith purchaser pursuant to Section 363(m) of the Bankruptcy Code and entitled to the protections thereunder. Neither the Debtors nor Purchaser have engaged in any conduct that would cause or permit the Asset Purchase Agreement to be avoided under Section 363(n) of the Bankruptcy Code.

l. In connection with the assumption and assignment of the Assigned Contracts, within ten (10) business days of the Closing, the Debtors shall pay all cure amounts to the non-debtor parties to the Assigned Contracts as required by the Bankruptcy Code or the Court, provided that if the Debtors dispute the cure amount of an Assigned Contract, the Debtors will establish an escrow fund and deposit the full cure amount asserted by the non-debtor party to the contract (or such lesser amount as ordered by the Court) into the escrow fund to be held in escrow subject to further order of the Court or agreement of the parties.

m. Purchaser has provided adequate assurance of its future performance under the Assigned Contracts and the proposed assumption and assignment of the Assigned Contracts satisfies all requirements of the Bankruptcy Code

including, *inter alia,* Sections 365(b)(1) and (3) and 365(f) to the extent applicable.

n. No provisions precluding or impairing the rights of the Debtors to assign the Assigned Contracts or preventing or restricting Purchaser from operating retail stores under its trade names in any leased premises shall be enforceable or any other particular provision therein.

o. Upon the assumption and assignment of the Assigned Contracts, Purchaser shall be deemed the Lessee or otherwise be substituted for the Debtor for all purposes under the Assigned Contracts from that point forward, including exercising any and all options, extension or renewals thereof; provided, however, the Debtor shall remain obligated to pay any allowed cure amounts due thereunder; and provided further, that nothing herein shall render Purchaser liable for debts of the Debtors under any theory of successor liability.

p. The Assigned Contracts are valid and binding, in full force and effect, and enforceable in accordance with their terms.

q. The sale of the Purchased Assets to Purchaser and the assumption by Purchaser of the Assumed Liabilities will maximize the value of the Debtors' estates and is in contemplation of the implementation of a plan of liquidation and necessary to the confirmation and consummation of any plan of liquidation. Accordingly, the sale of the Purchased Assets shall be deemed a sale "under a plan" within the meaning of Bankruptcy Code Section 1146 (c) and shall be exempt from any and all stamp taxes, recording taxes and similar taxes.

Appendix E

NOW THEREFORE, IT IS HEREBY ADJUDGED, DECREED AND ORDERED that:

1. The findings of fact set forth above and conclusions of law stated herein shall constitute the Court's findings of fact and conclusions of taw pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed.

2. The Motion is granted; *provided, however*, that notwithstanding anything contained herein or in the Transaction Documents to the contrary, the Debtors shall be deemed to have assumed and assigned each Assigned Contract as of the date of and only upon the Closing, and absent such Closing, each Assigned Contract shall neither be deemed assumed nor assigned and shall in all respects be subject to further administration under the Bankruptcy Code.

3. The Transaction Documents are hereby approved, and subject to the right of any lessor to object within ten days of service of the Order, the Purchaser's proposed use clause attached to its letter of intent to bid is hereby approved; provided that any such objection shall not affect any other provision of this Order. The Debtors are authorized to sell to Purchaser all of the Sellers' right, title and interest in and to the Purchased Assets pursuant to the terms of the Transaction Documents.

Appendix E

4. The Debtors are directed, authorized and empowered to execute, deliver and fully perform under the Transaction Documents and all agreements and documents contemplated thereby and related thereto and to take or perform such actions and expend such funds as may be necessary to effectuate the terms of the Transaction Documents, all transactions related thereto

5. From and after the Closing Date, Purchaser shall assume, satisfy and discharge the Assumed Liabilities and shall defend, indemnify and hold the Debtors harmless from and against any and all liabilities for any default, claim or pecuniary loss arising out of or related to the Assumed Liabilities from and after the Closing Date. The obligations of Purchaser under this paragraph shall survive consummation of the Asset Purchase Agreement and the Transaction Document for applicable periods set forth herein.

6. Purchaser has not assumed or otherwise become obligated for any of the Excluded Liabilities and has not purchased any of the Excluded Assets. Consequently, all holders of Excluded Liabilities are hereby enjoined from asserting or prosecuting any Claim or cause of action against Purchaser or the Purchased Assets to recover on account of any Excluded Liabilities. All persons having any interest in the Excluded Assets are hereby enjoined from asserting or prosecuting any claim or cause of action against Purchaser for any liability associated with the Excluded Assets.

7. As of the Closing Date, the Debtors shall not be responsible for any Assumed Liability and all holders of Assumed Liabilities are hereby enjoined from asserting or

prosecuting any claim or cause of action against the Debtors or their estates to recover any claim that is an Assumed Liability. All persons having an interest in the Assumed Liabilities are hereby enjoined from asserting or prosecuting any claim or cause of action against the Debtors for any liability associated with the Assumed Liability.

8. Pursuant to Sections 105(a) and 363(f) of the Bankruptcy Code, the Purchased Assets shall be transferred to the Purchaser upon the Closing free and clear of all Liens and Claims of any kind or nature, with all such Liens and Claims and Interests released, terminated and discharged as to the Purchased Assets, which Liens and Claims shall attach to the net proceeds of sale, in the order of their priority, with the same validity, force and effect that they now have against the Purchased Assets except for the Permitted Liens. Nothing contained herein shall be deemed to be an acknowledgment or consent by the Debtors as to the amount, priority or allowance of any claim or the validity, force and effect, or immunity from avoidance, of any Lien.

9. Upon the Closing Date, each of the Debtors' creditors, except holders of Permitted Liens with respect to such liens, is authorized and directed to execute such documents and take all other action as may be necessary to release its Liens upon or other interests in the Purchased Assets.

10. There shall be no rent accelerations or fees charged to Purchaser as a result of the assignment of the Leases, and the validity of the assumption, assignment and sale to Purchaser shall not be affected by any dispute between any Debtor and a lessor regarding the payment of the "cure"

amount. The Debtors are authorized to pay all cure amounts with respect to the Assigned Contracts pursuant to the Transaction Documents (or, if disputed, paying into escrow the full cure amount or such lesser amount as ordered by the Court) so that all such payments are made within ten (10) business days of the Closing.

11. All parties to the Assigned Contracts are forever barred and enjoined from raising or asserting against the Purchaser any default or breach under, or any claim or pecuniary loss, or condition to assignment, arising under or related to the Assigned Contracts existing as of the Closing or arising by reason of the Closing, except to the extent otherwise expressly provided herein.

12. The Assigned Contracts, upon assignment to Purchaser, shall be deemed valid and binding, in full force and effect and enforceable in accordance with their terms, subject to the provisions of this Order, and, pursuant to Section 365(k) of the Bankruptcy Code, the Debtors shall be relieved from any further liability, except for any cure amounts as herein provided.

13. Pursuant to Sections 363(b), 363(f), 365(a), 365(b) and 365(f) of the Bankruptcy Code, the assumption, assignment and sale to Purchaser of the Leases by the respective Debtor party thereto shall be effected by this Order in accordance with the terms and conditions hereof and as set forth in the Assignment and Assumption Agreement.

14. The Leases identified in Schedule 1.3 of the Asset Purchase Agreement, together with the amendments and

modifications of such Leases, constitute the Leases that are being assumed by and assigned to Purchaser by the Debtor parties thereto. Upon the assignment and assumption of such Leases, Purchaser shall be entitled to exercise any and all options, extension or renewal of said Leases as if it were the Debtors, notwithstanding any provisions in the Leases to the contrary.

15. Purchaser shall not be liable for any claims of the lessors under the Leases or liable for any breach of a Lease that accrued prior to Closing, nor may any lessor seek to enforce same against the Purchaser, except as specifically provided in the Asset Purchase Agreement, the Assignment and Assumption Agreement or this Order.

16. Purchaser shall have the right to close any Store for a reasonable period of time in order to stock, refixture, change signage and otherwise prepare the Store for opening under Purchaser's present and future trade names and such temporary closing shall not be deemed a default under the Leases.

17. All parties to the Assigned Contracts and beneficiaries thereof are hereby enjoined from taking any action to interfere with Purchaser's taking possession of and operating any Store pursuant to this Order and the Transaction Document.

18. Purchaser may operate the Stores under any trade name of the Debtors or under its own present or future trade names; *provided, however*, that Purchaser shall use only such trade names as are consistent with the type of merchandise

that the use clause of the relevant Lease permits the tenant to sell, as modified hereby, unless the lessor consents to a further modification of the use clause.

19. The Debtors subject to the Leases shall tender possession of the leased premises being assigned to Purchaser and shall provide Purchaser with original Leases (if available), store keys and security codes at Closing.

20. Despite any provision to the contrary that entitles any party to or beneficiary of any Assigned Contract to any right to terminate, compensation, injunctive relief or other right of any kind, by reason of the assignment of any Assigned Contract and any other action Debtor or Purchaser may take with respect to any Store pursuant hereto or the Transaction Documents, the Debtor's or Purchaser's failure to comply with such provision in connection with the consummation of the Transaction Documents shall not be a default or triggering event under any Assigned Contract and such provision shall not be enforceable.

21. Pursuant to Section 1146 of the Bankruptcy Code, all transfers and the delivery of instruments of transfer under the Transaction Documents are exempt from any and all stamp taxes, recording taxes and similar taxes imposed upon such sale or transfer under any Federal, State or local law.

22. This Order shall be binding upon and inure to the benefit of any successors and assigns of Purchaser and the Debtors, including without limitation, any trustee appointed in the Debtors' respective Chapter 11 cases or subsequent Chapter 7 cases.

Appendix E

23. Purchaser is hereby determined to be a good faith purchaser under Section 363(m) of the Bankruptcy Code, and is entitled to the protections afforded to a good faith purchaser thereunder.

24. The Debtors shall be authorized and empowered (but not directed) to pay, or establish an escrow account for, all or any portion of any real estate or personal property taxes (including any interest or penalties thereon) on the Purchased Assets.

25. This Order shall be effective and enforceable immediately upon entry and its provisions shall be self-executing.

26. The failure specifically to include any particular provisions of the Transaction Documents in this Order shall not diminish or impair the efficacy of such provisions, it being the intent of the Court that the Transaction Documents are approved in their entirety.

27. The Court shall retain sole and exclusive jurisdiction over all matters arising from or related to the Purchased Assets, the Motion, the Transaction Documents, the implementation thereof and this Order.

28. Notwithstanding anything to the contrary, the agreements regarding this Order agreed to between the Purchaser and the objecting landlords announced on the record of the hearing following the proffer of evidence regarding adequate assurance are incorporated herein and modify and supplement this Order.

Appendix E

Dated: New York, New York
December 1, 1998.

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

APPENDIX F — CERTIFICATION OF SUPREME COURT OF PUERTO RICO DENYING MOTION FOR RECONSIDERATION DATED MAY 23, 2006

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
SUPREME COURT

CASE: CC-2004-0900 ORIGINAL CASE: JPE-1999-0647
CIR. CASE: KLCE2004-0366

RODRIGUEZ OQUENDO, EVELYN

PETITIONER

v.

PETRIE RETAIL INC., *ET AL.*

RESPONDENTS

SPECIAL PROCEEDINGS

CIVIL ACTION OR OFFENSE

CONCEPCION CASTRO, CARLOS
POPULAR CENTER SUITE 1901
209 AVE. MUÑOZ RIVERA
HATO REY PR 00918

Appendix F

NOTICE

I CERTIFY THAT WITH REGARD TO THE MOTION FOR RECONSIDERATION, THE COURT ISSUED THE RESOLUTION ENCLOSED HEREWITH:

GONZALEZ VAZQUEZ MARTIN [ESQ.]
PO BOX 591-MERCEDITA PR
00715-0591

SAN JUAN, PUERTO RICO, THIS 23RD DAY OF MAY 2006.

AIDA I. OQUENDO GRAULAU, ESQ.
CLERK OF THE SUPREME COURT
(SGD.) BETHZAIDA TORRES MORALES
ASSISTANT CLERK

Appendix F

IN THE SUPREME COURT OF PUERTO RICO

No. CC-2004-900

Evelyn Rodríguez Oquendo,

Plaintiff and petitioner

v.

Petrie Retail Inc., D.I.P. and/or
Centro Apparel Corporation, D/B/A Marianne,

Defendants

Urban Brands, Inc.

(Respondent)

RESOLUTION

San Juan, Puerto Rico, May 19, 2006.

The first motion for reconsideration filed by petitioner is hereby denied.

It was so agreed by the Court and certified by the Clerk of the Supreme Court. Justices Rivera Pérez and Rodríguez Rodríguez would reconsider.

(Sgd.) A. I. Oquendo
Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

APPENDIX G — COMPLAINT DATED SEPTEMBER 22, 1999

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT OF PONCE

COMPLAINT NO.: JPE1999-0647

RE:

COMPLAINT FOR WRONGFUL DISCHARGE AND DISCRIMINATION IN EMPLOYMENT

EVELYN M. RODRIGUEZ OQUENDO

PLAINTIFF

V.

PETRIE RETAIL INC., D.I.P. AND/OR CENTRO APPAREL CORPORATION, d/b/a MARIANNE

EMPLOYER-DEFENDANT

Appendix G

COMPLAINT

TO THE HONORABLE COURT:

Comes now the plaintiff, represented by the undersigned attorney, and very respectfully **STATES AND PRAYS:**

1. Plaintiff is of legal age, and her address is:

   Urb. Los Caobos
   2325 Calle Tabonuco
   Ponce, PR 00731-6191

2. The defendant employer's known address is:

   150 Meadowlands Parkway
   Secaucus N.J. 07094

3. The plaintiff worker was employed by the defendant employer since December 4, 1980.

4. On October 5, 1998, the employer wrongfully discharged the plaintiff employee.

5. The defendant employer did not pay plaintiff the benefits provided by Act No. 80.

6. The employer owes plaintiff the sum of eleven thousand two hundred four dollars and sixty-seven cents ($11,204.67) under Act No. 80.

7. After discharging plaintiff, the employer replaced her with a younger person.

8. Plaintiff was discharged because of her age, and her discharge constitutes discrimination in employment, which is against the law.

9. Plaintiff suffered damages as a result of her discharge for age discrimination.

10. The employer must compensate the plaintiff worker for all the damages suffered by her as a result of the discrimination she suffered in her employment.

11. The damages suffered by plaintiff as a result of her wrongful discharge are currently assessed at $50,000.00.

WHEREFORE, we pray this Court, after the pertinent legal proceedings, to order the employer to pay the benefits provided by Act No. 80, to pay all the damages suffered by plaintiff as a result of her discriminatory discharge, and to pay legal interest, the penalty provided by law, costs, expenses, and a reasonable sum in attorney's fees.

In Ponce, Puerto Rico, this 22nd day of September 1999.

(Illegible signature)
MARTIN GONZALEZ VAZQUEZ
BAR ASS'N MEMBER NO. 5649
P.O. BOX 335716
PONCE, PR 00733-5716
TEL. 840-5600 FAX 841-5607

APPENDIX H — RELEVANT STATUTES

Full text of Sections 105 and 363 of the Federal Bankruptcy Code, 11 U.S.C. §§ 105, 363

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title [11 U.S.C. §§ 101 *et seq.*].

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title [11 USCS §§ 101 *et seq.*] shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28 [28 U.S.C. §§ 1 *et seq.*]. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 [28 U.S.C. §§ 151 *et seq.*] from its operation.

(d) The court, on its own motion or on the request of a party in interest[1] —

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title [11 U.S.C. §§ 101 *et seq.*] or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title [11 U.S.C. §§ 1101 *et seq.*]—

---

1. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Act of 2005, 109 P.L. 8, the first three lines of Section 105(d) stated:

> "(d) The court, on its own motion or on the request of a party in interest may —
>
> (1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and . . . ."

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees,

charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title [11 U.S.C. § 552(b)], whether existing before or after the commencement of a case under this title.

(b)

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332 [11 U.S.C. § 332], and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act [15 U.S.C. § 18a(a)] in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section [15 U.S.C. § 18a(a)], the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section [15 U.S.C. § 18a(b)], the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a) [15 U.S.C. § 18a(a)], unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section [15 U.S.C. § 18a(e)(2)], in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section [15 U.S.C. § 18a(g)(2)]; or

(iii) by the court after notice and a hearing.

(c)

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title [11 U.S.C. § 721, 1108, 1203, 1204, or 1304] and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or

lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only—

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362 [11 U.S.C. § 362].

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any

unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362 [11 U.S.C. § 362]).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was

community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365 [11 U.S.C. § 365], the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title [11 U.S.C. §§ 1101 *et seq.*, 1201

et seq., or 1301 *et seq.*] may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount.

In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.[2]

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

---

2 . Present subsection 363 (o) was inserted as part of the Bankruptcy Abuse Prevention and Consumer Act of 2005. Prior to that enactment, present subsection 363(p) was designated as subsection 363(o).

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

Supreme Court, U.S.
FILED

NOV 2 4 2006

No. 06-557

IN THE

Supreme Court of the United States

URBAN BRANDS, INC.

Petitioner,

v.

EVELYN RODRIGUEZ-OQUENDO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENT'S BRIEF IN OPPOSITION

MARTIN GONZÁLEZ VÁZQUEZ
MARTÍN G. GONZÁLEZ VÉLEZ
P.O. BOX 591
MERCEDITA, PR 00715-0591
PHONE (787) 840-5600
FAX (787) 841-5607

Attorneys for Respondent

QUESTION PRESENTED

The real and true question in this case is whether a non-purchasing corporation of a debtor's assets, has standing to question, intervene, and try to set aside the execution of a validly rendered judgment in default by a state court; judgment which was entered after service, notice and an opportunity to appear before the state court was given to the purchasing corporation, having chosen said buying corporation not to appear before the state court and claim and present the defense of 11 USC § 363(f) presented to this Supreme Court.

STATEMENT AS TO THE PARTIES

According to the Bankruptcy documents presented by Petitioner Urban Brands, Inc. in state court, she was not the corporation that bought debtor's assets, it was a **Urban Acquisition Corp.** No plausible explanation as to Urban's standing was presented before any of the stages of the proceeding in state court, even though Respondent has repeatedly questioned said standing.

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Wright & Miller, 5A Federal Practice and Procedure § 1391 11

JURISDICTION

Petitioner under color of 28 USC § 1258 attempts to make a collateral attack on a valid judgment rendered on matters of state law.

The federal law issue now raised in this Court was not squarely presented to the Court of First Instance, Superior Section of Ponce, Puerto Rico, at the first opportunity petitioner had, since Petitioner Urban Brands Inc. [or Urban Acquisition Corp] chose not to answer the complaint served on them for which judgment in default was rendered, having waived any statutory defense that may have being available to her under § 363(f) of the U.S. Bankruptcy Code at that time, and furthermore, since the state court judgment was never appealed nor set aside under state law.

STATEMENT OF THE CASE

Respondent Evelyn Rodríguez was employed with her former employer Petrie Retail, Inc. d/b/a Marianne for 18 years. On October 15, 1998 she was summarily dismissed and fired. A younger women was hired in her place.

On or about October 12, 1995, 3 years before Mrs. Evelyn Rodríguez was fired, her former employer filed a petition for bankruptcy under chapter 11 of The U.S. Bankruptcy Code [The Code]. Mrs. Rodríguez was never notified of this filing, nor was she ever included as a creditor or as a potential creditor.

As stated in the judgment of the Supreme Court of Puerto Rico, the evidence presented before the Court of First Instance, Superior Section of Ponce [Court of First Instance] showed that her former employer used 2 different corporate entities to pay her salary, as it appears from the income tax

withholding statements issued to the Treasury Department of Puerto Rico that were presented into evidence during trial. The Corporate structure of her employer was unknown to her.

On or about December 1, 1998, approximately 2 months after respondent was summarily fired, the U.S. Bankruptcy Court for the Southern District of New York, approved amongst other things, a sale of all the Marianne stores of former employer Petrie Retail Inc. in Puerto Rico, to a different corporation than Petitioner, namely **Urban Acquisition Corp,**[1] after which sale Petrie would be, as it was, completely liquidated and dissolved.

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1 Urban Brands Inc. has never satisfactorily explained her relationship if any to **Urban Acquisition Corp.** even though respondent has repeatedly questioned her standing to appear in this suit, Urban has avoided this issue and never gave an answer in state court.

Mrs. Rodríguez was never notified of the proposed sale[2], nor was she ever notified or summoned to a hearing to consider said sale, nor was a public notice given in Puerto Rico to all persons adversely affected by said sale.[3]

Hencefore Mrs. Rodríguez did not appear to oppose said sale, nor was able to take the necessary steps to protect her labor law claims against her former employer Petrie and/or against successor employer Urban Brands Inc. [or **Urban Acquisition Corp.**][4].

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2 11 USC§ 363 (b) requires that trustee give notice and a hearing in sales under 363 (f), *Western Auto v. Savage, 43 F3d. 714.*

3 Petitioner has never contested, denied, or proven to the contrary, this facts presented and proved in state court proceedings.

4 According to 11 USC § 363(f) all 5 criteria have to be met in order for the sale to proceed. Puerto Rico's law as per the Supreme Courts decision herein questioned, does not permit the sale of debtors property free and clear of lien, so the criteria of "*if applicable non bankruptcy law permits sale of such property free and clear of such interest...*" is not met in this case. -*Fairchild Aircraft v. Cambell, 184 B.R. 910.*

After the sale Urban Brands Inc. [or **Urban Acquisition Corp.**] took over all Petrie's Marianne's stores in Puerto Rico and its corporate offices at **150 Meadowlands Parkway Secaucus, N.J., 07094.**

Marianne's stores in Puerto Rico were kept and operated by petitioner and/or **Urban Acquisition Corp.**, in the same way and manner they had been operated by former employer Petrie during the last 18 years. Petitioner and/or **Urban Acquisition Corp.**, kept the store's name, namely Marianne; kept the same administrative personnel; same identifying colors and designs of the store; the same style of merchandise was sold; same physical location of stores were kept; same Bank and bank accounts were kept; same layout and business concept was advertised.

In sum there was no significant difference between businesses.

No public notice was given in Puerto Rico that Urban Brands Inc. [or **Urban Acquisition Corp.**] had acquired all of Petrie's Marianne stores in Puerto Rico.

Furthermore, it was discovered during execution that Urban Brands Inc. and **Urban Acquisition Corp.** are not registered in the Department of State of Puerto Rico as a domestic or foreing corporations as the law requires, and as such are not admitted to do business in Puerto Rico.

On September 29, 1999[5] Mr. Rodríguez filed a labor law suit or complaint against her former employer, not knowing that he had sold all his assets and interests in Puerto Rico in Marianne's stores.

In said complaint Mr. Rodríguez claimed a wrongful dismissal and an age discrimination action. The suit was filed

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5 Under Puerto Rico laws a employee has 1 year to file an age discrimination suit, and 3 years to file a wrongful dismissal suit, *Matos Molero v. Roche Products, 132 DPR 470.*

under state labor law's summary proceedings.

Summons were issued on October 5, 1999 and Petitioner was **personally** notified on October 15, 1999.

Service of process was served personally on Petitioner's store manager where Mrs Rodriguez had worked for years, and from where she had been summarily dismissed.

Petitioner instead of appearing before the Court of First Instance, and answer the complaint chose (1) not to appear at all; (2) chose not to claim or present the affirmative defense now asserted in this court under § 363 (f) of the U.S. Bankruptcy Code; and (3) chose to keep silent as to the fact that she or **Urban Acquisition Corp.**, had bought all of Marianne's Stores in Puerto Rico free and clear of liens from former employer, Petrie.

Having elapsed more than enough time to answer the complaint, and having chosen petitioner not to appear and defend herself

in state court, default was entered on May 25, 2000. Petitioner was notified of this action.

On April 23, 2001 a bench trial was held before state court in Ponce. Even though under default, evidence was required to be presented to the court, *Díaz v. Wyndham, 2001 TSPR 141*. Respondent presented several documents and her testimony at said trial.

On June 7, 2001, petitioner was notified of the judgment rendered in this case against her, to her corporate address at 150 Meadowlands, Parkway Secaucus, N.J. 07094.[6]

Even though petitioner was notified of the judgment rendered in this case, she chose once again to keep silent, and did not appeal the judgment; did not request a reconsideration of the judgment; nor requested that said judgment be set aside; as

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6 Although petitioner in state court denied that this was her address, evid ce found in its banks accounts when they were attached proved her wrcng.

it is recognized and authorized by state law, 32 L.P.R.A. Ap. III R. 49.2; 32 L.P.R.A. § 3124; Secretario v. Tribunal Superior, 91 DPR 864.

When respondent started execution of the judgment rendered, and when she attached a bank account in the name of ***"Urban Brands, Inc., Marianne Division, 150 Meadowlands Parkway, Secaucus , N.J. 07094"***, in Scotiabank of Ponce, Puerto Rico, petitioner Urban Brands Inc., not known purchaser **Urban Adquisition Corp.**, immediately appeared before the Court of First Instance, requesting that the execution be stayed because she had never being served with process in this case, nor had she ever been notified of the judgment rendered in this case. Both assertions were also proven wrong in the Court of First Instance.

The Court of First Instance, held lengthy hearings to consider petitioner's

claim that the execution be stayed and the judgment be set aside to prove that Mrs. Rodriguez had been justly dismissed.

The Court of First Instance, after careful consideration of petitioner's collateral attack on its court judgment dismissed petitioners claim concluding amongst other things, that petitioner was not only duly served with process in this case and had chosen not to answer the complaint, so she had forfeited or waived all affirmatives defenses to the complaint; but that by not appearing before said court she was stopped by law to question the judgment rendered, since she had not timely appealed, nor timely requested reconsideration; nor had timely requested that the judgment be set aside. Petitioner was adjudged a successor employer of Petrie, bound by state public policy against wrongful dismissal and age discrimination, see appendix C of Petitioners

Petition, pp 35a-46a.

It was held that by petitioner being found a successor employer she was subject to the laws of Puerto Rico and could not at this stage of the proceedings collaterally attack a valid judgment entered against her in default, *Brown v. Trustees of Boston Univ., 891 F2d. 337, cert. denied 496 US 937.* Her appearance at the stage of execution of judgment to contest said judgment was untimely and barred, Carestates Leasing Inc. v. Wright-Way Exp. Inc., 190 F.R.D. 356; Wright & Miller, 5A Federal Practice and Procedure § 1391.

The Supreme Court of Puerto Rico affirmed the Resolution of the Court of First Instance, and denied petitioners request that the execution of the judgment against her be stayed or stopped, see appendix A of Petitioners Petition, pp.1a-19a.

Puerto Rico's Supreme Court also

resolved as a matter of public policy that under state law debtors assets could not be sold free and clear of liens in detriment of an employees constitutional rights no to be subject to age discrimination, and under the law not to be unjustly dismissed form employment. The Supreme Court held that this case was a matter of Puerto Rico's employment public policy

Reasons For Denying The Petition

Petitioner is not entilled to a legal remedy in this case, because she chose not to appear before the Court of First Instance, and defend herself, bringing before that court as a matter of an affirmative defense against the complaint, 11 USC § 363 (f) of the Bankruptcy Code, as it is required by the law in Puerto Rico's, *32 L.P.R.A. Ap. III R 6.3; Díaz Ayala v. E.L.A., 153 DPR 675*[7]*; Alamo*

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[7] *Nycol Corp. v. Troco PLC, 949 F. Supp. 1[illegible]5; Mc Intosh v. Antonino, 71 F 3d. 29; Eberhardt v. Integrated Design, 167 F 3d. 861; Romstadt v. Allstate*

Pérez v. Supermercado amigo, 2002 TSPR 116.

Herein appearing respondent would be left with no legal remedy for her claim, since long ago her former employer was liquidated without her knowledge [without a notice and a hearing].

Petitioner's lack of diligence or bad faith cannot be used in her favor.

By choosing no to answer the complaint and defend herself; by choosing not to appear at the trial and defend herself; by choosing not to appeal the judgment, nor request reconsideration of the same; or request that said judgment be set aside; petitioner waived the legal defense now presented before this Supreme Court under 11 USC § 363(f).

Ins., 59 F 3d. 608.

CONCLUSION

The petition for certiorari should be denied, with costs and attorneys fees imposed on petitioner.

Respectfully submitted,

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(2)

No. 06-557

In the
Supreme Court of the United States

URBAN BRANDS, INC.,

Petitioner,

v.

EVELYN RODRÍGUEZ-OQUENDO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Puerto Rico

REPLY BRIEF FOR PETITIONER

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page ii of the Petition. There have been no changes to Petitioner's status since the date of that statement.

TABLE OF AUTHORITIES

CASES

American Living System v. Bonapfel (In re All American of Ashburn, Inc.), 56 B.R. 186 (Bankr. N.D. Ga. 1986) 3, 4, 5

Back v. LTV Corp. (In re Chateugay Corp.), 213 B.R. 633 (S.D.N.Y. 1997) 4, 5

Citicorp Homeowners Services, Inc. v. Elliot (In re Elliot), 94 B.R. 343 (E.D. Pa. 1988) 5

Fairchild Aircraft, Inc. v. Cambell (In re Fairchild Aircraft Corp.), 184 B.R. 910 (Bankr. W.D. Tex. 1995) 5

In re James, 203 B.R. 449 (Bankr. W.D. Mo. 1997) 5

In re Kellstrom Industrial, Inc., 282 B.R. 787 (Bankr. D. Del. 2002) 5

In re Lewis Jones, Inc., 369 F. Supp. 111 (E.D. Pa. 1973) 4

In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003) 2, 6

Western Automobile Supply Co. v. Savage Arms, Inc. (In re Savage Industrial, Inc.), 43 F.3d 714 (1st Cir. 1994) 4

Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159 (7th Cir. 1994) 5

STATUTES

11 U.S.C. § 105 1

11 U.S.C. § 363 ..... 3, 4, 6

REPLY BRIEF FOR PETITIONER

Respondent does not dispute the existence of a deep conflict within the state and federal courts on the important question of federal law presented in the Petition – concerning a federal bankruptcy court's power, pursuant to Sections 363(f) and 105(a) of the federal Bankruptcy Code, 11 U.S.C. §§ 105(a), 363(f), to extinguish state and common law successor liability claims against purchasers of a debtor's assets. Nor does Respondent dispute that the resolution by the court below of the question presented was contrary to the federal bankruptcy order's plain language, and that the decision below undermines important federal statutory interests of maximizing the value of debtors' assets in order to further the interests of creditors and employees, maintaining the priority scheme of the federal Bankruptcy Code, ensuring national uniformity of bankruptcy laws, and integrating the Commonwealth of Puerto Rico into the national economy.

Instead, Respondent attempts to put forth three alternative procedural reasons – none of which has any merit – as to why the Petition should be denied. Respondent argues that: (1) Petitioner lacks standing in this matter, because an entity named "Urban Acquisition Corp." purchased the debtor's assets at issue; (2) Petitioner waived the defense that it purchased the debtor's assets "free and clear" of successor liability because it did not appear in the Court of First Instance prior to entry of a default judgment against the debtor; and (3) Respondent did not receive adequate notice of the proposed sale of the debtor's assets, and thus Section 363 does not apply by its own terms.

None of these contentions is valid and none provides a basis for denying the Petition. The Petition should be granted so that the Court may resolve the state and federal circuit court split of authority on the question presented.

1. ***Petitioner's Standing***. Respondent has "questioned [Petitioner's] standing to appear in this suit." (Resp. Br. at 3 n.1). But this Petition arises out of Respondent's attempt to attach assets *belonging to Petitioner*, *i.e.*, "a bank account in the name of '*Urban Brands, Inc., Marianne Division*.'" (Resp. Br. at 9 (emphasis in original).) Petitioner plainly has "standing" to seek to preserve its own bank account from attachment.

Although Respondent questions whether Petitioner (Urban Brands, Inc.) was the initial purchaser of the "Marianne Stores" (Resp. Br. at 9 (asserting that "Urban Acquisition Corp." was the "known purchaser")), the federal Bankruptcy Order, on its face, states that the *assets* (the subject of the bankruptcy sale) are purchased "free and clear of all Liens and Claims of any kind or nature, with all such Liens and Claims released, terminated and discharged as to [those] Assets." (App. E at 62a ¶ 8.) Because a Section 363(f) order permanently extinguishes any interest in the debtor's assets against any subsequent owner of such assets, *see In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-90 (3d Cir. 2003), the issue of whether Petitioner was the initial purchaser or a subsequent assignee is not relevant to the question presented.

2. ***Asserted Waiver***. Respondent asserts that Petitioner "waived" its right to invoke federal bankruptcy law as a defense to enforcement of the judgment below because it failed to appear and assert the defense prior to the issuance of a default judgment against Petrie Retail (the debtor and prior owner of the assets of Marianne Stores). (Resp. Br. at 1, 12-13.) Even if, however, service of process against Petitioner can be deemed to have been properly made (an issue which the Commonwealth's courts did not resolve definitively), if the federal bankruptcy court's Section 363(f) order means what it says – *i.e.*, that any liabilities of Petrie Retail that might otherwise have been transferred to the purchaser of "Marianne Stores" are extinguished – then Petitioner cannot have waived

its rights by failing to answer a judicial summons that, as the record shows, was addressed exclusively to Petrie Retail. (*See* App. A at 2a-3a.) Nothing in the opinion of the court below supports the contrary view now advanced by Respondent.

In any event, the court below did not, *as a matter of state procedural law*, find that there had been any "waiver" precluding review of the federal law issue, and rested its decision upon the federal law issue. Accordingly, Respondent's waiver argument asserted under the procedural laws of the Commonwealth is not properly before this Court.

3. ***Adequate Notice of Bankruptcy Sale.*** Respondent asserts that Section 363(f) cannot apply because she "was never notified" of the proposed bankruptcy sale made "free and clear" of all liens and claims, as required by Section 363(b) of the Bankruptcy Code, 11 U.S.C. § 363(b). (Resp. Br. at 4.) Yet the federal Bankruptcy Order is predicated on an express finding that that "[t]he provisions of Sections 363(b), 363(f) and 365 have been complied with" and that "*[p]roper, timely and sufficient notice' was given "to all interested parties, including, but not limited to, (a) all parties who claim interests in or liens upon the Purchased Assets."* (App. E at 55a ¶ c (emphasis added).)

If the decision below is to interpreted as making a contradictory finding – as Respondent contends[1] – then the

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[1] In fact, the Supreme Court of Puerto Rico never ruled on the issue of whether the federal bankruptcy court's order complied with the notice requirement of Section 363(b). Instead, it ruled (incorrectly) that the Federal Bankruptcy Order was inherently incapable, under any circumstances, of extinguishing successor liability claims. (App. A at 15a.) Thus, its subsequent statement that "[Respondent] had no knowledge of the transfer of [Marianne Stores] to [Petitioner]" (*id.* at 17a) related not to the sufficiency of notice as a matter of federal bankruptcy law or to the validity of the Federal Bankruptcy Order under Section 363, but rather related solely to the *state law* question of whether the elements of the successor liability doctrine under Puerto Rico law had been satisfied. *Cf. In re All American of*

(cont'd)

decision below would constitute an impermissible collateral attack on a prior federal order. *See Back v. LTV Corp. (In re Chateugay Corp.)*, 213 B.R. 633, 637 (S.D.N.Y. 1997) ("'The ability collaterally to attack bankruptcy petitions in the state courts would also threaten the uniformity of federal bankruptcy law, a uniformity required by the Constitution'") (quoting *Gonzalez v. Parks*, 830 F.2d 1033, 1035 (9th Cir. 1987)); *American Living Sys. v. Bonapfel (In re All American of Ashburn, Inc.)*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (propriety of bankruptcy sale order cannot be considered by subsequent court as this would be an improper "collateral attack"), *aff'd*, 805 F.2d 1515 (11th Cir. 1986); *In re Lewis Jones, Inc.*, 369 F. Supp. 111, 118 (E.D. Pa. 1973) ("The finality of a Bankruptcy Court sale is not subject to inquiry or impeachment in any collateral proceeding.") (citing *Slocum v. Edwards*, 168 F.2d 627 (2d Cir. 1948)).[2]

Likewise unavailing is Respondent's attempt to challenge the validity of the federal Bankruptcy Order, by claiming that the statutory pre-requisites of Section 363(f)(1) of the Bankruptcy Code, 11 U.S.C. § 363(f)(1), were not met. As a threshold matter, this assertion is contradicted by the finding within the federal Bankruptcy Order that "*[t]he provisions of Section[] . . . 363(f) have been complied with and are*

(cont'd from previous page)
Ashburn, 56 B.R. at 190 ("The Court will, however, consider the issue of notice to the [successor liability claimants] to the extent that it may be relevant to the successor liability doctrine [under Georgia law].").

[2] Respondent's reliance on *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714 (1st Cir. 1994) (Resp. Br. at 4 n.2), is misplaced. In that case, unlike here, the First Circuit had direct appellate review over the bankruptcy court's sale order and to determine the issue of whether all affected parties had sufficient prior notice of the proposed Section 363(f) order. *See* 43 F.3d at 716, 721-23. By contrast, here, that determination was solely a matter for the federal bankruptcy court and for the courts directly reviewing the federal bankruptcy order, not for collateral review by the courts of the Commonwealth of Puerto Rico.

applicable as to the Purchased Assets." (App. E at 56a § e (emphasis added).) Respondent is precluded from challenging this finding in a subsequent state proceeding. *See Chateugay Corp.*, 213 B.R. at 637-38; *All American of Ashburn*, 56 B.R. at 190.

In all events, Respondent's attack on the propriety of the federal Bankruptcy Order approving the sale of the debtor's assets "free and clear" of all claims and liens is premised on the fallacious argument that "[a]ccording to 11 USC § 363(f) all five criteria [*i.e.*, each of sub-paragraphs (1) through (5) of 11 U.S.C. 363(f)] have to be met in order for the sale to proceed." (Resp. Br. at 4 n.4.) On the contrary, it has been universally held that:

> [Section 363(f)] is written in the disjunctive, not the conjunctive. Therefore, if any of the five conditions of § 363(f) are met, the Trustee has the authority to conduct the sale free and clear of all liens.

Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988); *accord, e.g., In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002); *In re James*, 203 B.R. 449, 454 (Bankr. W.D. Mo. 1997).[3]

Finally, as demonstrated in the Petition, Respondent's damages claim easily satisfies Section 363(f)(5), 11 U.S.C. §

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[3] *Fairchild Aircraft, Inc. v. Cambell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D.Tex. 1998) (Resp. Br. at 4 n.4) does not support Respondent's contention that sub-paragraphs (1) through (5) of Section 363(f) should be read conjunctively. *Fairchild Aircraft* merely holds, citing, *inter alia*, *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), that the *introductory* words of Section 363(f) (referring to a sale free of "interests" in the bankrupt property) should be read narrowly. *See Fairchild Aircraft*, 184 B.R. at 918-19. Far from supporting Respondent's position, this holding (and *Fairchild Aircraft's* reliance on *Zerand*) further illustrates the continuing circuit and state court split already identified in the Petition. (*See* Pet. at 9-15.)

363(f)(5), because she could have been "compelled" to accept a compromise of that claim upon a liquidation of Petrie Retail. *See Trans World Airlines*, 322 F.3d at 290-91. (*See also* Pet. at 11 n.3.) Accordingly, Respondent's collateral attacks on the validity of the federal Bankruptcy Order approving of the sale "free and clear" of all successor liability claims are unavailing.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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